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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-607

GEORGE HENSON MIREE, CLAUDE ESTES MIREE and DOROTHY ESTES MIREE, Minors, by and Through AUBREY S. MIREE, JR., and CLAUDE H. ESTES, JR., Co-Guardians of Said Minors,
Petitioners,

versus

DEKALB COUNTY, GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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To the United States Court of Appeals for the Fifth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, sitting en banc, entered in this case on August 25, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals en banc is not yet reported. It was an 8-5 opinion reversing a panel opinion of the Court of Appeals of January 30, 1976, which is reported at 526 F(2) 679. That opinion, in turn, was a reversal of orders of the United States District Court for the northern District of

Georgia, dated June 27, 1974, and September 25, 1974, which had dismissed Petitioners' claims against Respondent DeKalb County, Georgia. These opinions are all reproduced in the appendix attached hereto, with the en banc opinion of the Court of Appeals, review of which is here sought, appearing first in the appendix, at p. A-1.

JURISDICTION

The judgment of the Court of Appeals from which review is sought was rendered on August 25, 1976. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

1. Whether state law, or federal common law, determines the standing of third-party beneficiaries to sue on a grant agreement made between a county and the United States pursuant to the federal aviation laws.

2. Whether a federal court, sitting in diversity, can apply a federal common law rule with the effect of creating immunity from suit on contract for a county, when applicable state law would not grant immunity.

3. Whether federal common law adopts a restrictive rule for third-party beneficiary standing, or whether it is identical to the more liberal rule prevailing under state law.

4. Whether under federal law, a county can assert immunity from the consequences of its own gross fault in breach of safety provisions contained in an airport grant agreement with the United States, made expressly for the benefit of the users of the airport.

5. Whether there is an implied civil remedy under the federal aviation acts for death or personal injury caused by the breach of the safety standards contained in the federal aviation acts.

STATEMENT OF THE CASE

Mr. and Mrs. Richardson F. Miree were passengers in a jet airplane which crashed shortly after take-off from the DeKalb-Peachtree Airport, in DeKalb County, near Atlanta, Georgia, on February 26, 1973. They were killed, and are survived by three minor children who sue by their guardians. The cause of the crash was the ingestion of birds into the plane's jet engines as the plane cleared the end of the runway at take-off. Large flocks of birds were at the site, having been attracted by a garbage dump on the airport property immediately adjacent to the runway. The airport, including both the aviation facilities and the garbage dump, was owned and operated by DeKalb County.

The Miree children sued DeKalb County, as well as the corporate owners of the aircraft, and sued the United States, as the regulator of safety in all air travel and as operator of the control tower at the airport. A final order of the District Court dismissed the County on its pretrial motion to dismiss, on account of supposed governmental immunity from suit. The United States had filed cross-claims against the County, and those have not been dismissed.

The complaint sets forth facts supporting liability of the County on several grounds. Facts amounting to maintenance of a nuisance are alleged; negligence and wanton misconduct in permitting the garbage dump and its birds to remain near a jet runway are shown; misconduct in allowing a jet aircraft to take off at this particular time when flocks of bids were known

to be in the area of the runway is shown; and it is shown that maintenance of the garbage dump is in direct violation of a written contract between the County and the United States, of which contract these users of the airport were intended third-party beneficiaries.[1] Moreover, the fact of the County allowing

[1] The Complaint alleges that Defendant DEKALB COUNTY breached its contract with Defendant UNITED STATES. The contract attached to the complaint, marked Exhibit "A", contained the following agreements on the part of Defendant DEKALB COUNTY:

> "1. These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal aid for the Project or any portion thereof made by the FAA and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed under this Project, but in any event not to exceed twenty (20) years from the date of said acceptance of an offer of Federal aid for the Project.
>
> 2. *The Sponsor will operate the Airport as such for the use and benefit of the public.* . . . That Sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the Airport if such action is necessary for the *safe operation* of the airport or necessary *to serve the civil aviation needs of the public.*
>
> * * * * * * *
>
> 6. The Sponsor will operate and maintain in a *safe* and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the *aeronautical users* of the Airport other than facilities owned or controlled by the United States, and *will not permit any activity thereon which would interfere with its use for airport purposes.* . . .
> 11. The Sponsor will not enter into any transaction which would operate to deprive it of any of the rights and powers necessary to perform any or all of the covenants made herein, . . .
>
> 12. The Sponsor will keep up to date at all times an airport layout plan of the Airport showing . . . Such airport layout plan, and each amendment, revision or modification thereof, shall be subject to the approval of the FAA, which approval shall be evidenced by the signature of a duly authorized representative of the FAA on the face of the original layout plan. *The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the FAA*, if such changes or alterations might adversely affect the *safety*, utility, or efficiency of the Airport.

the garbage dump and the associated bird hazard to continue, with full knowledge of the hazard to jet aircraft, and the continued allowing of jet aircraft traffic during a time when flocks of birds were known to be present, are allegations of facts supporting a finding of wilful and wanton misconduct by the County. The facts alleged also supported a conclusion that the County, by engaging in the business of running a full-service commercial airport facility, was engaged in a proprietary function in a federal sphere of activity in interstate commerce which resulted in an effective loss of any immunity from suit.

The District Court granted the motion of the County to dismiss; and the Miree plaintiffs took an appeal to the United States Court of Appeals for the Fifth Circuit.

That appeal was heard by a panel of Judges Morgan, Godbold, and Dyer. Judge Morgan (himself a Georgia lawyer and former U.S. District Judge in Georgia) wrote the opinion of the panel, for himself and Judge Godbold. The decision is reported in 526 F(2) 679 (1976) and is appended hereto at p. A-15. Judge Dyer dissented. The majority opinion, while finding that plaintiffs' negligence and nuisance claims were barred by the County's tort immunity, held that the plaintiffs had stated a claim as third-party beneficiaries of the contract between the Federal Aviation Administration and DeKalb County, citing Georgia's statutory and case law as applicable, which hold that counties are not immune from suit on contracts, including suits by intended thirty-party beneficiaries. Judge Dyer's dissent contended that because the contract in question was entered pursuant to federal statute, and because the United States was a party, that federal law must control its interpretation. He contended that under federal common

> 13. Insofar as it is within its power and to the extent reasonable, the *Sponsor will take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft."* (Emphasis added.)

law, the contract would have to show not only an intent to benefit the plaintiffs (which is the requirement of Georgia law, clearly met by the language of the Grant Agreement) but also must manifest expressly an intent to compensate them in the event of its breach.

After publication of the panel opinion, the Fifth Circuit granted rehearing en banc on motion of the County. Of the thirteen members of the en banc Court, seven adopted as the opinion of the Court, per curiam, Judge Dyer's dissent from the panel opinion. One further member of the Court concurred. Five members of the Court, including the Chief Judge, dissented in an opinion by Judge Morgan; and the Chief Judge also dissented separately. The two dissenting opinions from the en banc decision, beginning at p. 5242 (Appendix, p. A-3), succinctly state the position presented by your petitioners here and make apparent the importance of a determination of these issues by the Supreme Court.

REASONS FOR GRANTING THE WRIT

The Court of Appeals split 8-5 on the important question of whether state law, or federal common law, should govern the rights of private litigants in claims arising out of a federal Aviation Act airport grant agreement. The majority found and applied a federal rule which (a) expands the immunity of a Georgia county beyond what the state's own rule requires; (b) discourages, rather than promotes, a federal policy of air transport safety; and (c) does not tend to create uniformity of result throughout the federal system. Petitioners contend first that state law should apply and secondly that federal common law is identical to state law in granting plaintiffs' standing to sue, and is not restrictive as found by the majority.

1. The Majority Opinion of the En Banc Court of Appeals Creates and Improperly Applies a Federal Common Law Rule in Conflict With Applicable State Law, and Expands a County's Governmental Immunity Beyond What the State's Own Rule Requires.

It seems clear that under Georgia law, as set forth by Judge Morgan in the panel opinion at 526 F(2) 685-686 (Appendix, pp. A-22-A-26), petitioners could sue, as intended third-party beneficiaries, for breach of the contract here in question. Georgia has created this contract exception to its own state-created rule of county immunity, and has thus said that while a county may not be sued in tort it can be sued for breach of contract, including such suit by intended third-party beneficiaries. County immunity is a state-created doctrine, and we believe it unnecessary to belabor here that it is a doctrine which the United States has no particular federal interest in encouraging. In fact the judicial and legislative trend throughout the country is strongly toward abolition of all sorts of governmental immunities. The United States, the County's partner in the Grant Agreement

and in the operation of the airport, is a co-defendant here under the Federal Tort Claims Act, having thus waived its sovereign immunity.

If this case had been brought in a Georgia state court, and Georgia law properly applied,[2] plaintiffs would be held to have stated a claim as third-party beneficiaries against the County, not barred by immunity. Instead, the action was brought in federal district court in Georgia, as a diversity action. By denying application of Georgia's contract exception to its general immunity doctrine, as its own courts would do, and by applying a more restrictive "federal common law" third-party beneficiary test, the federal court achieves here the result of granting to the Georgia county a contract immunity which its own courts have not granted. There is no federal common law immunity for a county—that doctrine, with whatever features and exceptions which may have been encrusted upon it or carved out from it, is purely a matter of state law. The Court of Appeals here recognized and applied the state's *general* doctrine of immunity, notwithstanding any federal policy; and at the same time *refused* to apply the state's own *exception* to its immunity doctrine, by asserting a federal policy which disallows the third-party beneficiary liberality which is the gist of the state's exception. Only by selecting pieces of the immunity doctrine and pieces of federal common law has the Court achieved its result. An across-the-board application of state law would have permitted the plaintiffs' claim under the contract exception to the immunity rule; and conversely federal law itself contains no immunity rule for counties (*Lincoln County v. Lunning*, 133 U.S. 529 [1890]—a county can be sued in federal court, and is not entitled, as is a State, to Eleventh Amendment immunity.) Furtheremore, the Court's result, while purporting to encourage uniformity of federal contract construction by application of federal law, in fact creates a lack of uniformity: many states do

[2] *Hancock County v. Williams*, 230 Ga. 723, 198 SE(2) 659 (1973).

not provide for county immunity at all, and most federal airport grant agreements are with municipal corporations, which are not immune. Thus the Court's decision, in the name of applying federal common law for the sake of uniformity, literally creates a situation where the state entity operating some few federally-funded airports is completely immune from liability, while most other such entities (municipalities, municipal authorities, and counties where there is no state law immunity doctrine) are in no way immune. We submit that it is apparent that both the federal policy of encouarging air transportation safety and the federal policy of achieving uniformity of law in this federally regulated area would be better served by a result which would eliminate immunity for entities operating federally-funded airports.

We must note one further aspect of the en banc majority's per curiam opinion. In its sole paragraph, it cites as supportive, in "reasoning" the very recent opinion of Chief Justice Burger in *United States v. Orleans*, . . . U.S. . . . (June 1, 1976). The Court below apparently finds *Orleans* supportive of the result of denying a civil remedy to persons injured or killed in connection with federally-funded projects. The Supreme Court there held that community agency employees were not federal employees, for purpose of federal Tort Claims Act liability. The Court below here has completely misapplied *Orleans*, which was a suit against the *United States* seeking that it be held responsible for the acts of persons who were not in fact its employees. *Orleans* must not be allowed to become authority for dismissing claims made directly against the non-federal agency to which federal funds flowed, as the en banc majority seems to have taken it for here.

2. **The Majority Opinion of the En Banc Court of Appeals —Over the Dissent of Five Members of the Court—Conflicts With Prior Decisions of This Court, in Holding That Federal Law Governs Interpretation of a Contract to Which the United States Is a Party, When the Suit Is Between Private Parties.**

The panel dissent of Judge Dyer adopted by the en banc majority holds (526 F2 686) (Appendix, p. A-27) that necessity for uniformity of decision requires that federal common law control the contract's interpretation. *United States v. Seckinger*, 397 US 203, reh den 397 US 1031 (1970), cited by the opinion as its principal authority, is quite different, in that there the plaintiff *was* the United States, seeking rights of indemnification under a standard clause of a contract to which it had been party. Similarly, *Clearfield Trust Co. v. United States*, 318 US 363 (1943), also relied upon by Judge Dyer, deals with the requirement of certainty as to the rights and duties of the United States itself on commercial paper which it issues.

The cases from this Court which are more closely on point do not impose a federal common law rule. *Bank of America Nat. T. &. Asso. v. Parnell*, 352 US 29 (1956), was a case involving the question whether federal or state law controlled in litigation concerning Government bonds and commercial paper. The suit was between private litigants in Federal District Court. The opinion held that state law governed the questions of burden of proof and of good faith, but that federal law governed the question of whether the bonds were overdue. That opinion is a limitation on a broad rating of *Clearfield*. The Court in *Bank of America* notes that transactions in government securities "also radiate interests in transactions between private parties. The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here . . . is far too speculative, far too

remote a possibility to justify the application of federal law to transactions essentially of local concern." (352 US at 33-34)

In *Wallis v. Pan American Petroleum Corp.*, 384 US 63 (1966), the Court considered a diversity case between private parties with respect to assignment of a mineral lease on United States land. There was a conflict between Louisiana law, which required such transfers to be in writing, and federal law, which had no such requirement. The Fifth Circuit held that the Mineral Leasing Act of 1920 imposed a pervasive federal regulatory scheme, and that Louisiana law should not be applied.

This Court reversed, holding that application of state law would not involve a significant threat to any federal policy or interest. The Court held: "We find nothing in the Mineral Leasing Act of 1920 expressing policies inconsistent with state law in the area that concerns us here." (384 US at 69)

The recent case of *United States v. Little Lake Misere L. Co.*, 412 US 580 (1973), in an opinion by Chief Justice Burger, draws the distinction the cited cases recognize. The Court there held a federal rule to be applicable because the state rule with respect to acquisition of real property was "plainly hostile" to the interests of the United States, and because the United States was itself plaintiff in the action, asserting its rights. Further, the Court considered a third factor which we must acknowledge is present in our case, namely that the issue is "one arising from and bearing heavily upon a federal regulatory program." (412 US at 592).

We find no case from this Court suggesting that contract rights of private parties arising out of federal contracts ought to be governed by a federal common law rule, particularly, as developed in other sections of this Petition, when the state rule would suport the goals of a federal regulatory program (here, air safety) and application of the supposed federal rule would thwart such goals; and when the federal rule would promote

non-uniformity, by leaving standing to sue to the vagaries of state law as to county immunity from suit in *tort*. We respectfully submit that there is a need for this Court to clarify whether federal common law should apply to govern the rights of private litigants arising out of a contract to which the United States is a party, and involving important federal regulatory interests. We submit that the proper test should be whether the rights and duties of the *United States* will be subject to uncertainty if varying state law is applied. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1973). While the federal government was a party to the contract here, and is a defendant here, under Federal Tort Claims Act claims, it has no particular interest in the outcome of the third-party beneficiary question in this diversity action, except the policy interests noted, which would be served by application here of state law. *Bank of America National Trust & Savings Assoc. v. Parnell*, 352 U.S. 29 (1956); *Wallis v. Pan American Petroleum Corporation*, 384 U.S. 73 (1966). *Nader v. Allegheny Airlines*, — U.S. — (June 7, 1976), is also authority that the federal statutory and regulatory scheme on civil aviation must not be taken to abridge common law remedies, such as petitioners here seek to enforce.

3. **The Majority Opinion of the En Banc Court of Appeals —Over the Dissent of Five Judges—Is in Conflict With Other Decisions From the Same and Other Circuits With Respect to What Is the Federal Common Law Rule on the Standing of Third-Party Beneficiaries to Sue on Contracts.**

The en banc majority, per curiam, adopts the dissent of Judge Dyer from the panel opinion, where Judge Dyer had stated at 526 F(2) at 686 (Appendix, p. A-27), that federal common law is identical to Restatement [First] of Contracts §145 (1932), which requires that the contract not only must reflect an intent to benefit the third party, but also must specifically

manifest an intent that he be compensated. This view, which becomes by adoption the express holding of the en banc majority, is clearly wrong as an expression of the federal rule. As noted by Judge Morgan in the en banc dissent at p. 5246 (Appendix, p. A-10), "the Restatement, now forty-four years old, antedates most of the major development of the third party beneficiary doctrine [and the] seven cases cited are inapplicable to the present case."

These seven cases relied upon by Judge Dyer in his panel dissent (now the opinion of the en banc majority), are cited in his panel opinion in a paragraph starting at 526 F(2) 679 (Appendix, pp. A-27-A-31). None of the cases are from our Circuit or from the Supreme Court. Moreover, we respectfully submit that they do not support the result. Although reluctant to expand the bulk of this Petition, we are obliged to discuss these seven cases in some detail, because reliance on them is the real meat of the opinion of the Court below, and we would not be willing to assert in a more summary fashion that Judge Dyer has misapplied them. Therefore petitioners' detailed critique of these cases, which Judge Dyer and the en banc majority below erroneously construed to create an improper federal common law rule, apepars in a long footnote hereto.[3] We submit that the en banc majority clearly

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[3] *West v. Morrison-Knudsen Company*, 451 F.2d 493 (9th Cir. 1971). This is *not* an application of "federal common law" but is a diversity jurisdiction opinion under the restrictive law of the State of Montana. The case holds that an injured employee of a subcontractor is not entitled to sue as a third-party beneficiary of a safety provision in the prime contract between the United States and the general contractor. The Court expressly states at the top of page 494 that it so rules *"because under the law of Montana* such a beneficiary of safety clauses in a contract could not recover in the absence of a specific promise in the contract to pay damages." (Emphasis added.)

Then at page 497 the Court says:

"Appellants argue, however, that the contract provisions operate to change the basic rules of tort so that a duty by contract

misapplied precedents from other circuits, and has created a clear conflict with the law of other circuits.

The seven cases cited by Judge Dyer as supportive of the use of a "federal common law rule," and specifically a restric-

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has been created, the breach of which creates a liability in tort for personal injury. They support their argument by the citation of cases from other jurisdictions which so hold. . . . *The problem here is not the weight of authority wherever it may lie, but the law of the State of Montana.*" (Emphasis added.)

Hensley v. United States, 279 F. Supp. 548 (D. Mont. 1968), is the next cited case by the dissent. Here the United States had a contract with a construction company for building a dam. An employee of that corporation was injured when an inadequate rope broke. The contract between the company and the United States stated that the contractor shall be fully responsible for safety of the employees. The plaintiff, the injured employee, it should be noted, was covered by the Montana Workmen's Compensation Act, and was being compensated under that statute. The plaintiff sought further compensation as third-party beneficiary of the contract between the United States and his employer.

The District Court focused solely upon the *Montana* third-party beneficiary statute, Section 13-204, RCM, 1947, which reads as follows: "A third-party may enforce a contract made expressly for his benefit." The Court notes that the Montana Supreme Court has ruled that the statute means the expression must be "in direct terms." Likewise, the Court notes that the Ninth Circuit in *National Surety Co. of New York v. Ulmen,* 68 F.2d 330 (9th Cir. 1933, cert. den'd 292 U.S. 624) "after an extensive review of the Montana authority concluded that a contract of the kind involved here is not enforceable by a third-party." If the case does stand for a rule that a contract must not only evidence an intent directly to benefit the third-party plaintiff but must also specifically evidence an intent to compensate him, then it is perfectly clear that the Court is following *Montana* law, not federal law or general law.

Judge Dyer next cites *Brotherton v. Merritt-Chapman & Scott Corp.,* 213 F.2d 477 (2d Cir. 1954). This was an opinion by Judge Frank which says simply that this was a clear case where certain described contract language does not create third-party beneficiary status for the plaintiff. As to whether a federal rule is deemed to exist, the case appears to suggest to the contrary, because of the six cases cited by Judge Frank three of them are state court cases, although the question the case presents was a contract between the United States and a construction firm. We do not read the case to

tive rule along the lines of Restatement [First] of Contracts §145, treated in detail in the footnote, can be summed up as follows: One, *Housing Corporation of America,* is a case of a third-party beneficiary suing the United States in an area where it had not waived sovereign immunity. Two (*Sayre* and

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be any support for the proposition that a federal rule should prevail to determine who is a third-party beneficiary, but rather as simply a finding that the particular contract provision in question was, as Judge Frank states at the beginning of the opinion, "intended solely for the government's benefit and not for the benefit of other contractors as third-party beneficiaries. We think this is so clear that we can content ourselves with a mere citation of leading cases." (213 F.2 at 478)

Next, Judge Dyer cites *Johnson v. Redevelopment Agency of the City of Oakland, California,* 317 F.2d 872 (9th Cir. 1963). The case holds that persons affected by an urban renewal development project involving contracts between the United States and a California agency may not sue the California agency as third-party beneficiaries of those contracts, to enjoin the project. The Court holds that the contract "is governed by federal law" and "the federal courts have consistently held that those not party to the contract have no standing to enforce conditions imposed on redevelopment agencies by the United States. . . ." (page 874). That the rule of that case is clearly limited to contracts concerning urban development is shown by the balance of the opinion, which goes on to explain that, in this area of legislation, three alternative remedies to such a third-party beneficiary lawsuit are provided, none of which these plaintiffs pursued. They are: (1) a grievance procedure before the federal housing administration; (2) federal and state requirements of public hearings, at which the plaintiffs did not appear; and (3) a California statutory provision for suit on the project in state court within 60 days of adoption. This also the plaintiffs failed to pursue. Thus the case does not announce any general federal disinclination towards third-party beneficiary suits on federal contracts, and it goes to some pains to show that the result of disallowing third-party beneficiary status to these plaintiffs here is not unfair, because of the several alternative remedies built into the statutory scheme. Subsequent cases have expressly refused to follow *Johnson.* In *Norwalk Core v. Norwalk Redevelopment Agency,* 395 F.(2) 920 (2nd Cir. 1968) the Court held that it would "decline to follow" *Johnson* (395 F.(2) at 935). The Fourth Circuit in *M. M. Crockin Co. v. Portsmouth Redevelopment & H. Auth.,* 437 F.(2) 784 (1971) also so held.

Judge Dyer next cites *Mahler v. United States,* 306 F.2d 713 (3d Cir. 1962). Here injured plaintiffs sued the United States be-

Johnson) are expressly limited to contracts with redevelopment agencies, at the suit of persons claiming to be injured by urban renewal projects. As discussed in the footnote, the Second Circuit has expressly declined to follow *Johnson*, as has the Fourth Circuit. In one (*Mahler*) the Court expressly looked both to state and federal law for a basis of liability. In another (*Brotherton*) the Court seems implicitly to look to

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cause a boulder on a federal highway fell on plaintiff's automobile. The Court expressly looked first at state law (at page 722) to see if there was any "Pennsylvania rule of law which would impose liability on a private person under similar circumstances." The Court found no such state rule. It then looked to whether there was any basis for liability under the Federal Tort Claims Act. There it noted the existence of an exception from United States liability if the action by the United States was made "at a planning rather than operational level. . . ." (page 723). The Court concludes that the United States' duties here were clearly "planning" rather than "operational" and affirmed judgment for the United States. The case really is of little relevance to our situation *vis a vis* County liability, but it should be noted that even here, where the question was the liability of the United States itself, the Court looked both to state law and to federal law to see if a basis for liability could be found under *either*.

Housing Corporation of America v. United States, 468 F2d 922 (U.S. Ct. Cl. 1972), next cited in the dissent, at p. 1581, we respectfully submit, is almost totally inapplicable—it is a question of a third-party beneficiary suing the United States in an area where the United States has not waived its sovereignty.

Finally, Judge Dyer in this series of citations relies upon *Sayre v. United States*, 282 F. Supp. 175 (N.D. Ohio 1967). This, like the *Johnson v. Redevelopment Agency* case cited by the dissent as supsupporting a restrictive federal rule of third-party beneficiary rights, is on its facts and by its express language an interpretation of an urban renewal venture between the United States and a local government. The case is brought by a property owner claiming to have been injured by the project, in that the use and value of his real property was damaged. The United States is dismissed as a defendant on its motion for summary judgment, under the "discretionary function" exception to the Federal Tort Claims Act, and certain limited claims against the City of Cleveland are allowed to proceed. Specifically upon the third-party beneficiary issue, the Court holds at page 190 that: "The federal courts have consistently held that those not parties to the contract have no standing to enforce conditions imposed on *redevelopment agencies*. . . ." (Emphasis added.)

both state and federal cases. In two (*West* and *Hensley*) the courts specifically stated that they were following a restrictive Montana state rule. Thus we respectfully suggest that the majority opinion is incorrect in stating that there is a body of federal cases which requires imposition of a restrictive federal common law rule to control questions of third-party beneficiary rights under contracts to which the United States is a party.

As noted by Judge Morgan's dissent at p. 5246 of the en banc opinion (Appendix, pp. A-10-A-13), there are at least two circuit court cases, including one from our circuit, supporting the view that federal common law on the third-party beneficiary issue is identical with Georgia law: *Bossier Parrish School Board v. Lemon*, 370 F(2) 847 (5th Cir. 1967); and *City of Inglewood v. City of Los Angeles*, 451 F(2) 948 (9th Cir. 1972).

In *Bossier* the Fifth Circuit held that black children who were not allowed to attend a county (Louisiana parish) school system could sue as third-party beneficiaries under a contract between the United States and the school system. As Judge Morgan notes, "Because *Bossier* was brought as a federal question suit, it is clear that the panel was applying federal common law when it held that the assurances given by the defendant in return for the United States grants made permissible a third-party beneficiary suit by plaintiffs." (En banc dissent, pp. 5246-47; Appendix, pp. A-10-A-13).

And in *City of Inglewood*, a federal question case involving an airport grant agreement, just as in our case, the Ninth Circuit held that the federal aviation acts *did* contemplate that the assurances required by the United States of the airport authority as part of the grant agreement *were* intended for the benefit of the local residents and the users of the airports, both with respect to flight safety and welfare of persons living nearby the airport. The Ninth Circuit *allowed* the third-party beneficiary action. Its opinion is absolutely in conflict with that of the en banc majority here.

The separate dissent of Chief Judge Brown from the en banc opinion, at pg. 5248 (Appendix p. A-14) concludes that it is obvious from the record in our case that the petitioners were intended beneficiaries of the grant agreement, and that as a matter of federal law, which he feels is controlling, they are entitled to sue for the "contractual dereliction" of the County.

Thus whether our case be seen as a federal question jurisdiction case, on the one hand; or as a diversity case where federal common law ought to control because important federal interests are involved; or as a diversity case where the federal court is due to apply state law—in any of these three situations, which embrace the full range of possibilities—the Miree plaintiffs were entitled to standing as third-party beneficiaries.

4. **The Majority Opinion of the En Banc Court of Appeals, as Noted by the Five Dissenting Judges, Expands Federal Question Jurisdiction.**

Judge Dyer's panel dissent at 526 F2 686 (Appendix, p. A-27) adopted by the en banc majority as its opinion, holds that "the necessity of uniformity of decision demands that federal common law, rather than state law, control the contract's interpretation." The en banc dissent, at p. 5245 (Appendix, p. A-9), notes that "through the majority's holding that federal common law controls the entire interpretation of any contract entered into by the United States, however, it is quite possible that federal jurisdiction has been expanded."

While noting that the Supreme Court has not decided the issue, the en banc dissenters note that the "better view" meanwhile is that a case arising under federal common law is a federal question case, and is within the original jurisdiction of the federal courts. (en banc dissent, pp. 5245-5246 (Appendix, pp. A-9-A-10), citing *C. Wright, Law of Federal Courts* 250 (2nd Ed. 1970). Thus, notes the dissent, under the majority's

holding there would appear to be federal question jurisdiction whenever third-parties claim the benefit of a contract involving the United States. This is an important question on which there is no authority in point from the Supreme Court.

5. **Uniformity of Decision and Implementation of the Federal Policy of Encouraging High Standards of Safety in Aviation Require Recognition of a Rule Which Will Permit the Aeronautical Users of Federally Funded and Regulated Airports a Remedy Against All State Governmental Units Which Operate Such Airports.**

This much-needed result can be accomplished in this case in any of several ways:

(a) By adopting Judge Morgan's opinion, which permits the use of a state-created third-party beneficiary remedy.

(b) By applying the federal common law rule of *Bossier, supra,* and *City of Inglewood, supra,* which permit such third-party actions as a matter of federal law. This would be an application of Chief Judge Brown's reasoning in his separate dissent. As a corollary, it might be noted that such a rule can be so drawn as to be limited to situations where there are strong federal policies to be enforced—such as equal school access, in *Bossier,* and aviation safety, as in *City of Inglewood* and the case at bar. This would eliminate the threat of greatly expanded federal-question jurisdiction.

(c) Thirdly, as we argued to the lower court, but not treated in its opinions, an implied civil remedy for violation of safety provisions under the aviation statutes of the United States could be recognzed by this Court; as has been done in *Rauch v. United Instruments, Inc.* (E.D. Pa.), 44 Law Week 2149, 44 Law Week 2289 (opinions of Sept. 11, 1975 and Dec. 17, 1975); in *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Calif. 1972); in *Town of East Haven v. Eastern Airlines, Inc.*, 282

F. Supp. 507 (1968); and *In Re Paris Air Crash*, 399 F. Supp. 732 (D.C. Calif. 1975). (Of these four cases, *Gabel* and *Paris Air Crash* involved death claims. *Town of East Haven* concerned jet noise, and *Rauch* does not involve personal injury.) A recent note in 51 N. Y. U. Law Rev. 231 (May, 1976) proposes that *Gabel* be followed and that a federal cause of action be recognized.

(d) Fourthly, as we also argued below, the Court could hold that the County here waived its immunity from suit when it entered the federal sphere of air commerce. *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184, reh. den. 377 U.S. 1010 (1964).

CONCLUSION

For the reasons stated, it is submitted that the Petition for Certiorari should be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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Attorneys for Petitioners

Certificrte of Service

I hereby certify that three copies of the foregoing Petition for Certiorari have this date been served by mail upon all parties represented in this proceeding.

This 29th day of October, 1976.

Alan W. Heldman

APPENDIX

APPENDIX A

George Henson MIREE et al.,
Plaintiffs-Appellants,

v.

U.S.A.

Judith Anita PHILLIPS, widow of
David Emanuel Phillips, deceased,
Plaintiff-Appellant,

v.

UNITED STATES of America, Defendant-
Third-Party Plaintiff-Appellee.

DeKALB COUNTY, GEORGIA,
Defendant-Appellee,

v.

MACHINERY BUYERS CORP., et al.,
Third-Party Defendants-Appellees.

William Michael FIELDS,
Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee,

DeKalb County, Georgia, et al.,
Defendants-Appellees.

FIREMAN'S FUND INSURANCE COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee,

DeKalb County, Georgia, et al.,
Defendants-Appellees.

Pearlie CHAISSON, Plaintiff-Appellee,

v.

SOUTHEAST MACHINERY, INC.,
Defendant and Third-Party
Plaintiff-Appellant,

v.

UNITED STATES of America, et al.,
Third-Party Defendants-Appellees.

Nos. 74-3670, 74-3822, 74-3864,
74-3870 and 74-3881.

United States Court of Appeals,
Fifth Circuit.

Aug. 25, 1976.

Appeals from the United States District Court Northern District of Georgia.

Before BROWN, Chief Judge, GEWIN, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE, TJOFLAT and HILL, Circuit Judges.*

PER CURIAM:

The Court en banc adopts as its opinion Parts I, II, and IV of the majority panel opinion in this cause, 526 F.2d 679-686. The Court en banc adopts as its opinion the dissenting opinion of Judge Dyer, 526 F.2d 686-688 in lieu of Part III of the majority panel opinion. While not directly in point, the Court has reviewed the case of *United States v. Orleans*, — U.S. —, 96

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* Because of illness Judge Wisdom did not participate in the hearing or the consideration of this case. Judge Thornberry was a member of the En Banc court that heard oral arguments but due to illness did not participate in this decision.

S.Ct. 1971, 48 L.Ed.2d 390. The reasoning of the dissenting opinion, adopted here, is remarkably consistent with the policy considerations noted by the Chief Justice in *Orleans*.

Accordingly, the judgment of the district court is

AFFIRMED.

TJOFLAT, Circuit Judge (concurring).

I agree that, in general, government contracts, and especially those having to do with the airways, should be controlled by federal law. *See generally Illinois v. Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972); *United States v. Seckinger*, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970); *Northwest Airlines v. Minnesota*, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283 (1944); *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied sub nom., Forth Corp., v. Allegheny Airlines, Inc.*, 421 U.S. 978, 95 S.Ct. 1979, 44 L.Ed.2d 470 (1975). *See also* Federal Aviation Act of 1958, § 1108(a), 49 U.S.C. § 1508(a) (1970). I also agree that the public was not an intended third-party beneficiary of the contract assurances mandated by 49 U.S.C. § 1110, *now enacted at* 49 U.S.C. § 1718 (1970). Consequently, I concur.

LEWIS R. MORGAN, Circuit Judge, with whom JOHN R. BROWN, Chief Judge, and GOLDBERG, AINSWORTH and GODBOLD, Circuit Judges, join (dissenting):

The court *en banc* adopts as its decision Parts I, II, and IV of the majority panel opinion, which held that under Georgia law plaintiffs could not recover against defendant DeKalb County under a theory of negligence,[1] of nuisance, or of waiver of immunity through the County's purchase of liability insurance.

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[1] While plaintiffs presented abundant evidence to make out a prima facie case of negligence against defendant in the operation of the DeKalb-Peachtree Airport, an analysis of applicable Georgia case law indicated that DeKalb County was immune from suit under a theory of negligence.

The majority *en banc* also adopts Judge Dyer's dissent in the original panel opinion in lieu of Part III of that same opinion. In Part III, the majority panel opinion held that under Georgia law plaintiffs could sue as third party beneficiaries to a contract between the Federal Aviation Administration (FAA) and DeKalb County. Through its adoption of Judge Dyer's dissent, however, the majority *en banc* holds that suit as third party beneficiaries is likewise unavailable to plaintiffs and that, accordingly, their entire action was properly dismissed.

DeKalb County entered into an agreement with the FAA whereby in return for a grant of money by that agency, it gave the FAA certain assurances, among which were its promises that it would operate the airport for the use and benefit of the public, maintain it in a safe and serviceable condition, and limit use of adjacent land so that it would not interfere with the safe use of the airport. *Miree v. United States*, 5 Cir., 526 F.2d 679 at 686, n.12. The majority panel opinion held that under Georgia law plaintiffs could sue as third party beneficiaries for the County's alleged breach of its contractual duties.[2] Judge Dyer's dissent, which the court *en banc* now adopts, argued that federal common law, not Georgia law, should control the interpretation of third party beneficiary rights under a contract entered into by the United States Government and other parties. We respectfully dissent.

I. Inapplicability of Federal Common Law.

After *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), in which the Supreme Court held that in

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[2] Specifically, through the County's continued operation of the county garbage dump, which lay adjacent to the airport, large numbers of birds swarmed over the airport and created allegedly hazardous conditions. It was the ingestion of a large number of these birds into the air intake system of the airplane's engine that allegedly caused the crash in question.

diversity cases[3] state law generally shall apply, it became clear that federal general common law no longer existed. Yet, with the much publicized *Clearfield Trust Co. v. United States*,[4] 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1973), it became clear that federal common law, as opposed to federal *general* common law, still lived. In *Clearfield*, a check drawn on the United States Treasurer payable to a named government employee was stolen and forged and the Clearfield Trust Company paid the check over the forged endorsement. In determining that federal common law, not state law, applied, the Supreme Court held that rights and duties of the United States on commercial paper that it issues should not be controlled by local law. That is, "the issuance of commercial paper by the United States is on a vast scale and transactions in that paper . . . will commonly occur in several states. The application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. . . . The desirability of a uniform rule is plain." *Id.* at 367, 63 S.Ct. at 575. Hence, the rationale supporting the *Clearfield* decision is that when the rights and duties of the United States are to be determined, uniformity of result is desirable. *Accord, United States v. Standard Oil*, 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947) (indemnification of Government for injury to its soldier is matter of federal fiscal policy that demands uniform result).

It seems quite clear to us then that absent explicit Congressional command, federal common law should be chosen in a

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[3] Justice Brandeis' exact words were: "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state . . . There is no federal general common law." 304 U.S. at 78, 58 S.Ct. at 822.

[4] Actually, on the same day that *Erie* was announced, Justice Brandeis held that "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S.Ct. 803, 811, 82 L.Ed. 1202 (1938).

diversity case only when there exists an identifiable federal interest in the outcome of the particular case or in a consistent result in cases of its class. Such an interest is not involved in this case. Here, we have litigation between two non-federal parties over the rights of one as a third party beneficiary to a contract executed by the other. While the federal government was a party to this contract, it has no particular interest in the outcome of the third party beneficiary question in this diversity suit.[5] Such a question is a matter to be decided by the particular state's own contract law. Indeed, whether or not the plaintiffs could recover as third party beneficiaries is of no significance to the United States in that it affects no rights or liabilities of the United States[6] and involves no impact on a federal fiscal policy.[7]

We find our approach supported by analogous Supreme Court cases. In *Bank of American National Trust & Savings Association v. Parnell*, 352 U.S. 29, 77 S.Ct. 119, 1 L.Ed.2d 93 (1956), a diversity case in which the United States was not a party, the Supreme Court held that in litigation between two private parties over negotiation of federal bonds, state law controlled. The words of Justice Frankfurter are particularly appropriate for the present case:

> The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here . . . is that the floating of securities of

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[5] To the extent that the United States would have any interest in the outcome, its interest would favor recovery by the plaintiffs, in that the United States required the County to promise to maintain safe conditions at the airport. Unless the United States intended this to be an empty promise by the County, one would assume that it would favor a result encouraging the keeping of this promise. See Section II, infra.

[6] *Clearfield Trust Co. v. United States, supra.*

[7] *United States v. Standard Oil, supra.*

> the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of the converter. *This is far too speculative, far too remote a possibility to justify the application of a federal law to transactions essentially of local concern.*

Id. at 33-34, 77 S.Ct. at 121. (Emphasis added.) Likewise, in *Wallis v. Pan American Petroleum Corporation*, 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369 (1966), the Supreme Court held that state law applies to a case between two private parties involving the assignment of an oil and gas lease given by the United States through the Mineral Leasing Act for Acquired Lands. In rejecting the application of federal common law, the Court stated:

> In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area, as is true in this instance, it must be remembered that 'Congress acts . . . against the background of the total corpus juris of the states . . .' Hart & Wechsler, The Federal Courts and the Federal System 435 (1953). Because we find no significant threat to any identifiable federal policy or interest, we do not press on to consider other questions relevant to invoking federal common law, such as the strength of the state interest in having its own rules govern . . .
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> * * * * * * *
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> Finally, *it is said that because the leases are issued by the United States and concern federal lands, there is a federal*

> *interest in having private disputes over them justly resolved. Apart from the highly abstract nature of this interest, there has been no showing that state law is not adequate to achieve it.*

Id. at 68-71, 86 S.Ct. at 1304, 16 L.Ed.2d at 373-74 (emphasis added). We find the present case to be analogous to both *Parnell* and *Wallis*. Like *Parnell* and *Wallis*, this case involves litigation between private parties over a matter in which the federal government has been somewhat involved, but in which no issue of the rights and liability of the government is being litigated and in which no federal interest demanding a uniform disposition is involved.[8]

In addition to these Supreme Court precedents, we feel that there are several policy considerations that favor application of state law over federal common law in this case. First, there is the important consideration of comity between the state and federal governments deemed so important in *Erie*. As the Supreme Court has stated: "As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. *The instances where we have created federal common law are few and restricted.*" *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 83 S.Ct. 1441, 1445, 10 L.Ed.2d 605, 611 (1963) (emphasis added) (citation omitted). Here there exists a ready-made body of Georgia law on contract law, a subject well-disposed to adjudication through state law.[9]

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[8] Indeed, the three cases cited by Judge Dyer for the proposition that federal common law should apply involved situations in which the United States was either seeking indemnity or was itself suing for damages on a contract made between it and another party. *See Miree v. United States, supra*, at 686. Hence, in these cases the United States did have an identifiable interest in the outcome of the case that demanded an application of federal common law.

[9] We note that in several instances, the Supreme Court has applied state law in a suit brought in federal court for the reason that the matter is one of particular state concern and one on which the state has already developed a large body of law. For example, in *United States v. Yazell*, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966), a suit brought by the United States to obtain payment of a loan made by the Small Business Administration, the Supreme Court applied state law on the issue of the female defendant's disability to contract, noting that the state had developed a body of law on the issue in question and that, absent an overriding federal interest, the state's interest in the matter should be respected. *Id.* at 352, 86 S.Ct. at 507, 15 L.Ed.2d at 410. Although the jurisdictional basis for it was the existence of a federal question, *DeSylva v. Ballentine*, 351 U.S. 570, 580-81, 76 S.Ct. 974, 979-80, 100 L.Ed. 1415, 1427-28 (1956), is in accord (state law, not federal law, determines the meaning of "children" under § 24 of the Copyright Act of 1947). We feel that the interest of the state in applying its own law governing third party beneficiary rights is equally compelling.

Second, we find the result in this case cruelly ironic in that through the application of federal common law, the majority preserves the County's immunity from suit by imposing a stricter test for third-party beneficiary standing than Georgia's own courts do. In view of the fact that the United States has enacted a complex scheme of federal aviation laws whose purpose is to promote air safety and that the Government in its contract with DeKalb County demanded assurances that the latter would maintain the airport in a safe condition, we cannot understand what federal purpose can possibly be served by conferring on DeKalb County greater immunity than its own state laws give it.

Finally, there is one other possible ramification of the case that could prove to be an unpleasant surprise for my brothers who join in the majority opinion: the expansion of federal jurisdiction. There was some concern that our holding in the original panel opinion expanded federal jurisdiction, that, carried to its logical conclusion, it would result in making a "federal case" out of a minor slip and fall accident at a county airport. The basis of that fear always seemed unclear, in that the present case is a diversity case, not a "federal question" case in which a particular holding could well expand federal jurisdiction.[10] There-

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[10] *E. .g., Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

fore, whether we had held that Georgia law did or did not render the County liable on a third party beneficiary theory, the case was nevertheless a diversity case whose particular holding could not possibly expand or contract federal jurisdiction. Through the majority's holding that federal common law controls the entire interpretation of any contract entered into by the United States, however, it is quite possible that federal jurisdiction has been expanded. This is, "though the matter remains undecided by the Supreme Court, the better view is that a case 'arising under' federal common law is a federal question case, and is within the original jurisdiction of the federal courts as such." *C. Wright, Law of Federal Courts* 250 (2d ed. 1970). Accordingly, it would seem that with this court's *en banc* decision there is now federal question jurisdiction over any claim made as a third party beneficiary to a contract involving the United States—a result that gives a much broader jurisdictional base than the present diversity basis alone.

For the above reasons, we believe the original panel opinion applying Georgia law to the question should be affirmed.

II. Third Party Beneficiary Suits Under Federal Common Law.

While we do not believe that federal common law should apply in this case, we also dissent from the majority's holding that such federal law would preclude plaintiffs' suits as third party beneficiaries. Judge Dyer cites the *Restatement (First) of Contracts*, § 145 (1932) and seven cases—none of which derives from either the Supreme Court or this circuit—for the proposition that members of the public can recover damages under a contract with the United States to which they are not a party only when the contract manifests an intention that they be so compensated. *Miree v. United States, supra,* at 686-87. We contend that this authority is not persuasive in that the Restatement, now forty-four years old, antedates most of the major development of the third party beneficiary doctrine and that the seven cases

cited are inapplicable to the present case.[11] Two cases out of the Fifth and Ninth Circuits that are much closer to the present case support our argument that federal common law should favor plaintiffs' recovery. In *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967), this court held that black children who were not allowed to attend the Bossier, Louisiana public schools could sue as third party beneficiaries under a contract between the United States and the Bossier Parish school system. Specifically, the United States Department of Health, Education, and Welfare had administered grants of two million dollars to the Bossier Parish school system, for which the school system gave various promises in return, among them the assurance that children of parents stationed at Barksdale Air Force Base could attend the public schools; the black children discriminated against in *Bossier* were children of such parents. Because *Bossier* was brought as a federal question suit, it is clear that the panel was applying federal common law when it held that the assurances given by the defendant in return for the United States grants made permissible a third party beneficiary suit by plaintiffs.

In a case even closer factually to the present case, the Ninth Circuit held that plaintiff, an adjacent city to the defendant air-

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[11] None of these cases seem particularly applicable to the facts of this case. In two of the cases—*West v. Morrison-Knudson Company*, 451 F.2d 493 (9th Cir. 1971) and *Hensley v. United States*, 279 F.Supp. 548 (D.Mont.1968)—the courts were utilizing *Montana* third-party beneficiary law. *Brotherton v. Merritt-Chapman and Scott Corp.*, 213 F.2d 477 (2d Cir. 1954), does not clearly state whether it is applying federal or state law, but, in any event, that case involved an incidental beneficiary. *Mahler v. United States*, 306 F.2d 713 (3rd Cir. 1962), was a tort case, not a third party beneficiary action. Two cases that disallowed third party suits—*Johnson v. Redevelopment Agency*, 317 F.2d 872 (9th Cir. 1963) and *Sayre v. United States*, 282 F.Supp. 175 (N.D. Ohio 1967)—were limited to the facts of their case, facts which included a comprehensive federal statutory scheme on redevelopment that precluded such suits. Finally, *Housing Corp. of America v. United States*, 468 F.2d 922, 199 Ct.Cl. 705 (U.S. Ct.Cl.1972), denied a third party beneficiary action because the United States had fulfilled its duty under the contract and because a section of the contract explicitly prohibited third party beneficiary actions.

port, had standing to sue as a third party beneficiary to grant agreements made between an airport and the FAA. *City of Inglewood v. City of LosAngeles*, 451 F.2d 948 (9th Cir. 1972). In that case, plaintiff, who alleged federal question grounds, sued for damages and injunctive relief arising from noise that resulted from operation of the Los Angeles International Airport. Reversing the district court in its holding that plaintiff could not sue as a third party beneficiary in that it was not an intended beneficiary of the grant agreement, the Ninth Circuit examined the legislative history of 49 U.S.C.A. § 1110(4) [now 49 U.S.C.A. § 1718(4)],[12] pursuant to which the grant agreement was executed, and found that flight safety was not the sole purpose of the section, but that the welfare of persons living close to airports was also to receive protection. The court stated:

> If Los Angeles made the assurances required . . . in applying for various grant agreements, then Inglewood must certainly be included within the category of intended beneficiaries of those assurances. *Congress had some purpose in enacting these two sections of Title 49. It is not to Los Angeles' benefit to be required to give the Secretary those assurances; nor are the assurances of any independent benefit to the Secretary.* The Secretary merely receives them for the benefit of, and in the place of, the surrounding communities and residents of the area.

Id. at 956 (emphasis added). Of course, the facts in the present case do involve flight safety, as opposed to noise disturbance, but the Ninth Circuit's discussion in Inglewood makes it quite

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[12] That section reads:

> As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him, that—
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> (4) appropriate action . . . has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and take-off of aircraft.

clear that such safety was the primary object sought by the grant assurances. Just as in *Inglewood*, in this case, it was not for the benefit of DeKalb County nor for the benefit of the FAA that the government required the County to promise that it would maintain the airport in safe operating condition. Obviously, the only parties that the assurance could possibly have benefited were those members of the flying public who used DeKalb-Peachtree Airport. Accordingly, we contend that under federal common law plaintiffs were the intended beneficiaries of the grant agreement and should have been allowed to so sue.

III. Conclusion.

In summary, we feel that regardless of which law should be applied in this case, the result reached here is clearly incorrect. We have in this case plaintiffs suing a fully insured County against whom a strong prima facie case of negligence and breach of contract have been made. Under our interpretation of Georgia law, the law which we believe to be applicable here, plaintiffs could sue as third party beneficiaries to the grant agreement between the United States and DeKalb County.[13] We feel that the same result should obtain under application of federal common law. Yet, the majority applies a federal common law narrower in its allowance of recovery than Georgia law, the forum that should have the greater interest in determining whether its county should be immune from suit. In the face of a contract provision enacted at the insistance of the United States that requires DeKalb County to maintain a safe airport and of an extensive scheme of federal aviation laws whose purpose is to encourage safe airport operations, we cannot understand what federal interest is served by overruling Georgia law to defeat an action by these plaintiffs. We respectfully dissent.

JOHN R. BROWN, Chief Judge (dissenting):

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[13] *Hancock County v. Williams*, 230 Ga. 723,198 S.E.2d 659 (1973).

I join in Judge Morgan's fine dissent. I have reservations about part I but these are not decisive of this case.

I emphasize that I believe federal, not state, law controls. This is an area in which there is a need for that consistency which can only be provided by uniform national standards—a consistency, in short, which requires the application of federal construction of federal contracts. Like Judge Morgan, however, I believe that federal law not only does not preclude the plaintiffs below from recovering as third party beneficiaries but that federal law compels this result.

To assert that Congress, in enacting 49 U.S.C.A. § 1718(4), meant for contracts between the FAA and airports to benefit that countless multitude of taxpayers and land-locked citizens and to exclude those of the flying public—including peripatetic Judges whose airborne safety is central to them—is to say Congress was incongruous. Who else but the flying public—with or without life tenure (which after all lasts for this life only)—were they thinking of? The proof of the pudding, as this record indicates, is that the Federal Government, disturbed about the presence of garbage fed fowls, sought and obtained from the District Court an injunction against the continuance of this menace. In what name was this remedy invoked—in the name of the safety of the air traveling public. If the Government could, should, and did protect them from this hazard to their very temporal existence, how in the name of legalese can we conclude that the contract did not mean that fliers—or unfortunately, their successors, assigns, widows and orphans—while protected in a general sense, were not to be entitled to the only redress an aggrieved survivor has for such a contractual dereliction?

APPENDIX B

George Henson Miree et al.,
Plaintiffs-Appellants,

v.

United States of America et al.,
Defendants-Appellees.

Judith Anita Phillips, Widow of David Emanuel Phillips, Deceased,
Plaintiff-Appellant,

v.

United States of America,
Defendant-Third-Party Plaintiff-Appellee.

DeKalb County, Georgia,
Defendant-Appellee,

v.

Machinery Buyers Corp. et al.,
Third-Party Defendants.

William Michael Fields,
Plaintiff-Appellant,

v.

United States of America,
Defendant-Appellee,
DeKalb County, Georgia, et al.,
Defendants-Appellees.

Fireman's Fund Insurance Company,
Plaintiff-Appellant,

v.

United States of America,
Defendant-Appellee,
DeKalb County, Georgia, et al.,
Defendants-Appellees.

Pearlie Chaisson,
Plaintiff-Appellee,

v.

Southeast Machinery, Inc.,
Defendant and Third-Party Plaintiff-Appellant,

v.

United States of America et al.,
Third-Party Defendants-Appellees.

Nos. 74-3670, 74-3822, 74-3864, 74-3870, 74-3881.

United States Court of Appeals,
Fifth Circuit.

Jan. 30, 1976.

Appeal from the United States District Court for the Northern District of Georgia.

Bebore GODBOLD, DYER and MORGAN, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

On February 26, 1973, a Lear Jet crashed shortly after take-off from the DeKalb-Peachtree Airport. The alleged cause of the crash was the ingestion of a large number of birds swarming over the airport and adjacent county garbage dump. Damage was substantial; all passengers were killed, the plane was destroyed, an individual on the ground was severely injured by burning jet fuel that fell from the disabled plane shortly before crashing, and property at the crash site was extensively damaged. Separate actions were brought by the passengers' survivors,[1] the burn victim,[2] the owner of the plane,[3] and the owner of the property at the crash site.[4] The various plaintiffs, suing in diversity, asserted theories of negligence, nuisance, and breach of contract. Defendant DeKalb County moved to dismiss on grounds that it was immune from suit under Georgia Law. Defendant's motion was granted, and the plaintiffs appealed.

I

[1] The plaintiffs present a prima facie case of negligence that would certainly survive a motion to dismiss in the absence of any immunity question. The essence of their claim is that large numbers of birds had flocked around the garbage dump adjacent to the airport for a considerable period of time, that the county was aware of the bird problem prior to the crash, and that birds had interfered with planes on prior occasions. All this, of course, is to no avail if counties are immune from being sued in negligence. Relying heavily on three cases, the plaintiffs contend that counties are not immune from negligence suits. First, they argue that the Uniform Airports Law (UAL)[5] was held to constitute a statutory waiver of *municipal* immunity in *Caroway v. City of Atlanta*, 85 Ga.App. 792, 70 S.E.2d 126 (1952), a case involving airport negligence. Next, they cite *Southern Airways v. DeKalb County*, 102 Ga.App. 850, 118 S.E.2d 234

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[1] In No. 74-3670, George Henson Miree, Claude Estes Miree, and Dorothy Estes Miree sue as survivors to their parents, Mr. and Mrs. Richardson F. Miree. In No. 74-3822, Judith Anita Phillips sues as survivor to her husband, David E. Phillips.

[2] No. 74-3864, *William Michael Fields v. DeKalb County, Georgia.*

[3] In No. 74-3870, Fireman's Fund Insurance Co. sues as assignee to Southeast Machinery's claim for destruction of the Lear Jet.

[4] No. 74-3881, *Pearlie Chaisson v. Southeast Machinery, Inc.*

[5] Ga. Code Ann. § 11-201, *et seq.*

(1960), for the proposition that suits may be maintained against counties for breach of contract under the UAL, because operation of an airport is a proprietary function. Finally, they tie up the argument with a quotation from *Taylor v. King*, 104 Ga. App. 589, 122 S.E.2d 265 (1961), to the effect that for immunity purposes there is no distinction between municipalities and counties in cases involving airports authorized under the UAL. We must conclude, however, that when read in context of the surrounding case law and statutory framework, these cases stand for much narrower propositions.

An examination of the statutory bases of immunity for counties and municipalities reveals distinctly different provisions. County immunity is provided for in Ga. Code Ann. § 23-1502. "A county is not liable to suit for any cause of action unless made so by statute." While almost as succinct in its language, the provision for municipal immunity in Ga. Code Ann. §69-301 is not nearly so unequivocal. "Municipal corporations shall not be liable for a failure to perform, or for errors in performing, their legislative or judicial powers. For neglect to perform, or for improper or unskillful performance of their ministerial duties, they shall be liable."

The operational distinction between these statutes has long been recognized by the Georgia courts. The second sentence of the municipal immunity statute has been consistently read to waive immunity whenever a municipality undertakes a proprietary function. Thus, in *Ware County v. Cason*, 189 Ga. 78, 79, 5 S.E.2d 339 (1939), the Georgia Supreme Court held a county hospital immune to suit even though prior cases had found no immunity for city hospitals.

> There is a statute which, on the basis of distinction between governmental functions of municipal corporations and ministerial acts, inhibits municipal liability for damages flowing from breach of duty in regard to the former, and

> imposes municipal liability for breach of duty in regard to the latter. Code, § 69-301; *Cornelisen v. Atlanta*, 146 Ga. 416 (91 S.E. 415). But there is no such statute relating to counties and no statute making a county liable to suit for tort based on negligence in operating a hospital causing injury to a pay patient therein.

Accord, *Purser v. Dodge County*, 188 Ga. 250, 251-52, 3 S.E.2d 574 (1939).

It follows that the requirements for resisting immunity in cases involving municipal and county airports is significantly different. To sue a municipal airport, a plaintiff need only show that the operation of a municipal airport is a proprietary function; to sue a county airport, a plaintiff must show an express statutory waiver of immunity. When read in light of this distinction it becomes apparent that the extensive discussion of the UAL in *Caroway v. City of Atlanta*, 85 Ga.App. 792, 70 S.E.2d 126 (1952), was not intended to demonstrate that the statute waived immunity. Rather, the intent was to demonstrate that, despite language in the UAL which could have been read to say that the operation of airports is a governmental function, the operation of an airport is a proprietary function, and, accordingly, is susceptible to suit.

In *Southern Airways v. DeKalb County*, 102 Ga.App. 850, 118 S.E.2d 234 (1960), the court made considerable use of the proprietary function discussion in *Caroway*, but not, as suggested by the plaintiff, for the purpose of finding either that the UAL constitutes a statutory exception or that the county participation in a proprietary function waives immunity. Rather, the purpose of the court's inquiry into whether the operation of an airport constituted a proprietary function was to fit this case within the framework of a line of Georgia cases that allow County Commissioners to enter into binding contracts extending beyond their term of office only if the contract relates to a proprietary function of the county. *Id.* at 854-855, 118 S.E.2d 234.

On motion for rehearing the court in *Southern Airways* clarified its position as to the county's lack of immunity from suit on the contract. The court ruled that since the UAL expressly authorizes the county to contract, the logical inference of that statute is that the county may be sued for breach of contract. This is consistent with several other Georgia decisions which hold that statutory authority to contract is necessarily a statutory waiver of immunity to suit for breach. *Hancock County v. Williams*, 230 Ga. 723, 198 S.E.2d 659 (1973); *Deason v. DeKalb County*, 222 Ga. 63, 148 S.E.2d 414 (1966).

Finally, an examination of *Taylor v. King*, 104 Ga.App. 589, 122 S.E.2d 265 (1961), reveals that the language relied upon by the plaintiffs was taken out of context. The *Taylor* case involved alleged negligence by a municipal airport. Accordingly, it was necessary for the plaintiffs to demonstrate that operation of the airport was a proprietary function to avoid immunity. Relying on the *Caroway* and *Southern Airways* cases, the court concluded that the operation of this municipal airport was a proprietary function. In the course of its discussion of the *Southern Airways* case the court said: "For this purpose there is no distinction between municipal and county liability." The antecedent to which "this purpose" refers is not, however, determination of immunity, as suggested by the plaintiffs, but only determination of whether or not an airport is a proprietary function.[6] An examination of the Uniform Airports Law reveals no language that even vaguely suggests that the legislature intended to waive county immunity for negligence in the operation of airports. Having been cited no other statutory authority, we necessarily must conclude that the county is immune from suit on theory of negligence.

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[6] *See also, City of Macon v. Powell*, 133 Ga. App. 907, 908, 213 S.E.2d 63 (1975).

II

The second theory propounded by the plaintiffs is that the county is liable for special damages resulting from the maintenance of a nuisance. The district court overruled this theory, holding that in the absence of statutory authority to be sued, the county is immune under Ga. Code Ann. § 23-1502. In response, the plaintiffs assert that the requisite statutory authority to sue exists in Ga. Code Ann. § 72-103.

> Generally, a public nuisance gives no right of action to any individual. If a public nuisance shall cause special damage to an individual, in which the public did not participate, said special damage shall give a right of action.

In addition, they cite several Georgia cases holding a county liable for maintenance of a nuisance.

[2] Although several Georgia cases have held either a municipality or a county liable for a nuisance, none has cited § 72-103 as its authority for not holding the county immune. We could read this statute to create an exception to immunity only if we read "public nuisance" to mean a nuisance created or maintained by a public body. Ga. Code Ann. § 72-102, however, defines public and private nuisance in terms of who is affected and who is injured, not in terms of the perpetrator of the nuisance. Thus, it must be concluded, that § 72-103 does not create a statutory exception to the general rule of immunity. Rather, its function, like several comparable Georgia statutes,[7] is to create a cause of action for a particular kind of wrong.

There are, nevertheless, circumstances under which a county may be sued in nuisance. In both *Nalley v. Carroll County*, 135

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[7] *See, e. g.*, Ga. Code Ann. § 105-103 which creates a cause of action for an ordinary tort.

Ga. 835, 70 S.E. 788 (1911), and *DeKalb County v. McFarland*, 223 Ga. 196, 154 S.E.2d 203 (1967),[8] counties were held liable for flood damage caused by a county public works project. Neither case, however, made clear its basis for finding the counties susceptible to suit. In *Baranan v. Fulton County*, 232 Ga. 852, 209 S.E.2d 188 (1974), the Georgia Supreme Court clarified the situation. The counties were not immune in those cases because Article 1, § 3, para. 1 of the Georgia Constitution[9] provides that private property shall not be taken for public purposes without just and adequate compensation. The effect of the flooding was to take the plaintiffs' land for public purposes, thus creating an action for compensation under the Constitution, and accordingly, an exception to § 23-1502.[10]

[3] The injuries that occurred to the plaintiffs in the present case do not parallel those of the plaintiffs in *Baranan, McFarland*, or *Nalley*. In those cases land was rendere useless as the incidental result of a public project; the taking was an inevitable result of the public project, and the county knew or should have known that flooding would occur. The action was for compensation for land, the taking of which was necessary to the completion of the project. In this case, the injury to property resulting from the air crash is not a necessary and foreseeable consequence of maintaining a garbage dump and, consequently, not comparable to the flooding that results from river and drainage projects. Thus, we must conclude that there is no statutory exception under which these plaintiffs may sue the county for nuisance.

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[8] *See also*, later opinions in the *McFarland* case at 224 Ga. 618, 163 S.E.2d 827 (1968); 226 Ga. 321, 175 S.E.2d 20 (1970); 231 Ga. 649, 203 S.E.2d 495 (1974).

[9] Ga. Code Ann. § 2-301.

[10] *Accord Williams v. Ga. Power Co.*, 233 Ga. 517, 519, 212 S.E.2d 348 (1975).

We reach this conclusion despite a line of cases that hold municipalities liable for personal injuries resulting from a continuing nuisance. *Town of Ft. Oglethorpe v. Phillips*, 224 Ga. 834, 165 S.E.2d 141 (1968); *City of Blue Ridge v. Kiker*, 189 Ga. 717, 7 S.E.2d 237 (1940); *City Council of Augusta v. Cleveland*, 148 Ga. 734, 98 S.E. 345 (1919); *City of Gainesville v. Pritchett*, 129 Ga.App. 475, 199 S.E.2d 889 (1973).[11] These cases allow municipalities to be held liable in nuisance despite § 69-301. While the cases do not explain why the municipalities are not immune, it is clear from several opinions that it is not because they fall within the exception for proprietary functions. Instead, this line of cases must be read to be a common law exception to the general statutory rule expressed in § 69-301 that municipalities are immune. Such an exception cannot be created for counties, because § 23-1502 explicitly requires that exceptions to immunity be created by statute. In accord with this reading of *Town of Oglethorpe v. Phillips, supra*, is *Sheley v. Board of Public Education for City of Savannah and County of Chatham*, 132 Ga.App. 314, 317-18, 208 S.E.2d 126 (1974), *aff'd*, 233 Ga. 487, 212 S.E.2d 627 (1975), in which the Georgia Court of Appeals declined to apply the immunity exception of the *Ft. Oglethorpe* case to cases in which governmental subdivisions other than municipalities were sued in nuisance. See also, *Williams v. Ga. Power Co.*, 233 Ga. 517, 519, 212 S.E.2d 348 (1975). Accordingly, we hold that these cases do not create a cause of action in nuisance against counties.

III

[4] Finally, the plaintiffs seek to sue the county as third party beneficiaries to a contract between the Federal Aviation Administration (FAA) and DeKalb County. That contract provided for, among other things, the safe operation of the airport

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[11] *See also* Annot., 34 A.L.R.3d 1008, 1044-49 (1970).

and surrounding properties controlled by the county. The district court rejected this claim, holding that counties are immune from suit for breach of contract. In support of that conclusion they cite *Purser v. Dodge County*, 188 Ga. 250, 3 S.E.2d 574 (1939). That case, however, never reached the question. "The question certified does not involve a determination as to whether a county would be liable on a contract which the law might expressly or impliedly authorize it to make." *Id.* at 253, 3 S.E.2d at 575. It is now a well settled proposition of Georgia law that if a statute authorizes a county to contract, it also implicitly creates a cause of action for breach. Since the action against the county is authorized by statute, it is not barred by § 23-1501. *Hancock County v. Williams*, 230 Ga. 723, 724, 198 S.E.2d 659 (1973); *Deason v. DeKalb County*, 222 Ga. 63, 65, 148 S.E.2d 414 (1966); *Decatur County v. Praytor, Howton and Wood Contracting Company*, 163 Ga. 929, 933-34, 137 S.E. 247 (1927); *Southern Airways Co. v. DeKalb County*, 102 Ga. App. 850, 865, 118 S.E.2d 234 (1960) (on motion for rehearing). Since it is clear that DeKalb County may be sued for breach of contract, the only remaining question is whether the plaintiffs may sue as third party beneficiaries to the contract between DeKalb County and the FAA.

[5] Actions on contracts by third party beneficiaries are explicitly provided for by Ga. Code Ann. § 3-108. ". . . the beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on said contract." The case law interpreting this statute has, however, limited its application to intended beneficiaries, as distinguished from incidental beneficiaries. Compare *Robinson Explosives, Inc. v. Dalon Contracting Co.*, 132 Ga. App. 849, 851-52, 209 S.E.2d 264 (1974), with *Stewart v. Gainesville Glass Co.*, 131 Ga.App. 747, 752-53, 206 S.E.2d 857 (1974), *aff'd*, 233 Ga. 578, 212 S.E.2d 377 (1975). A typical situation under which a third party beneficiary cannot sue is presented by *Lee v. Petty*, 133 Ga.App. 201, 210 S.E.2d 383 (1974). In that case the plaintiffs attempted to sue Ware County under a contract between the county and a leasing company that required the county to obtain liability insurance. Merely because the plaintiffs would benefit from the existence of an insurance policy was not sufficient. The court held that "[w]ithout question there was no contemplation that the appellants [would] be beneficiaries under the terms of the contract and hence there is no basis for their recovering under this case." *Id.* at 206, 210 S.E.2d at 386. Since the purpose of the insurance clause was not to protect the public, but to determine responsibilities and liabilities between the parties, injured members of the public could not sue.

[6] The remaining question, therefore, is whether the safety provisions in the contract between DeKalb County and the FAA were intended to benefit the public. The county argues that such a showing is not sufficient; not only must the parties have intended to benefit the public, but they also must have intended to compensate members of the public who are injured as a result of a breach. Under Georgia law, however, it is well settled that a contract with a public body confers a benefit on the public if it is clear from the appropriate contractual provisions that the parties intended those provisions to benefit the public.

In *Smith v. Ledbetter Brothers, Inc.*, 111 Ga.App. 238, 141 S.E.2d 322 (1965), the defendant had entered into a road building contract with the state of Georgia. Included in that contract was an agreement that the defendant would "provide all safeguards, safety devices, and protective equipment and take any other needed actions, on his own responsibility or as the contracting officer may determine, reasonably necessary to protect . . . the safety of the public . . ." *Id.* at 239, 141 S.E.2d at 324. The plaintiff in that case alleged that the defendant was negligent in carrying out his contractual obligation to provide for the safety of the public, and that this negligence had resulted in the plaintiff's injury. The court held that the plaintiff could sue for this breach. "A contract between the State

Highway Department and a construction company by which the latter undertakes to provide for the safety of the public during the construction of the work inures to the benefit of the public, and a member of the public injured as a result of negligence in failing to do so may sue the contracting party directly." *Id.* at 240, 141 S.E.2d at 324. Accord *M. R. Thomason and Associates, Inc. v. Wilson*, 125 Ga.App. 658, 661-62, 188 S.E. 2d 805 (1972). The court did not discuss whether the parties contemplated creating a cause of action for the public. The mere creation of a contractual duty for the public's benefit necessarily created a cause of action in the public for its breach.

[7] The situation and contracts presently before the court are quite similar to those in the construction cases. DeKalb County's contract with the FAA provides that the county will operate the airport for the use and benefit of the public, will operate and maintain it in a safe and serviceable condition, and will limit use of adjacent land so that it will not interfere with the safe use of the airport.[12] The county breached this contractual duty, and as a result of that breach the plaintiffs were injured. We hold that these contractual provisions inured to the benefit of the public, and, accordingly, the plaintiffs may sue for breach.

IV

[8, 9] Some of the plaintiffs also argue that the purchase of an insurance policy by the county creates a cause of action. Georgia law, however, has consistently held that the purchase of liability insurance by a county, even if the policy contains an explicit clause prohibiting the insurance company for pleading the immunity of the county, neither waives the immunity of the

[12] *See* Project Application, Sponsor's Assurances, paragraphs 2, 6, 7, and 13 (appearing in the appendix of No. 74-3870, *Fireman's Fund Insurance Co. v. United States*, at 80-81). The Project Application is incorporated into the Grant Agreement by reference (appearing in Appendix, *supra*, at 62).

county from suit, nor creates a direct action against the insurer. *Arnold v. Walton*, 205 Ga. 606, 611-14, 54 S.E.2d 424 (1949); *Revels v. Tift County*, 235 Ga. 333, 335, 219 S.E.2d 445 (1975); *Lee v. Petty*, 133 Ga. App. 201, 205-06, 210 S.E.2d 383 (1975).

In conclusion, we hold that DeKalb County is susceptible to suit on theory of breach of contract and that all of the plaintiffs may sue as third party beneficiaries to the contract between DeKalb County and the FAA. All other actions are barred by the immunity of the county. Accordingly, we reverse.

DYER, Circuit Judge (dissenting):

Although I agree with the majority's conclusion that DeKalb County is immune from suit for negligence and nuisance, I disagree with their conclusion that the county can be held liable by plaintiffs as third-party beneficiaries of the Federal Grant Agreement between the United States and the county. At most, plaintiffs are incidental beneficiaries of that agreement, not entitled to recover for breach of contract.

At the outset, the majority errs by looking to Georgia law in determining whether plaintiffs are third-party beneficiaries.[1] Although jurisdiction here is based upon diversity, the contract we are interpreting is one in which the United States is a party, and one which is entered into pursuant to authority conferred by federal statute. The necessity of uniformity of decision demands that federal common law, rather than state law, control the contract's interpretation. *United States v. Seckinger*, 1970, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224; *Smith v. United*

[1] Even if Georgia law should apply, the result would not be different. The majority recognizes that under Georgia law, only *intended*, and not *incidental* beneficiaries, may recover for breach of contract. As will be shown in this dissent, nothing in the grant agreements or the underlying statutes raises the status of the plaintiffs from incidental to intended beneficiaries.

States, 5 Cir. 1974, 497 F.2d 500; *First National Bank v. Small Business Administration*, 5 Cir. 1970, 429 F.2d 280.[2]

Federal cases considering the question of when members of the public at large are third-party beneficiaries of a contract to which the United States is a party are few in number. However, those cases support the position of the Restatement of Contracts, § 145, that such members of the public can recover damages under a contract with the United States to which they are not a party only when the contract manifests an intention that they be so compensated.[3] *West v. Morrison-Knudsen Company*, 9 Cir. 1971, 451 F.2d 493 (Injured employee of subcontractor is not third-party beneficiary of safety provisions of prime contract between United States and general contractor); *Hensley v. United States*, D.Mont.1968, 279 F.Supp. 548 (same);

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[2] As stated in *Clearfield Trust Co. v. United States*, 1943, 318 U.S. 363, 367, 63 S.Ct. 573, 575, 87 L.Ed. 838:

> The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.

Even though we are here considering the liability of parties other than the United States, this same consideration controls, for if plaintiffs are third party beneficiaries with respect to the obligations of the county under the contract, then they would also be third-party beneficiaries with respect to the obligations of the United States.

[3] Restatement of Contracts, § 145, provides in pertinent part:

> A promisor bound to the United States or to a state or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so, unless,
>
> (a) an intention is manifested in the contract, as interpreted in light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences. . . .

Brotherton v. Merritt-Chapman & Scott Corp., 2 Cir. 1954, 213 F.2d 477 (provision in contracts requiring contractors to cooperate with one another was for benefit of government, and contractor could not recover from another as third-party beneficiary of that provision). *See also Johnson v. Redevelopment Agency*, 9 Cir. 1963, 317 F.2d 872; *Mahler v. United States*, 3 Cir. 1962, 306 F.2d 713; *Housing Corp. of America v. United States*, Ct. of Claims 1972, 468 F.2d 922, 199 Ct.Cl. 705; *Sayre v. United States*, N.D. Ohio 1967, 282 F.Supp. 175. It is not enough that the contract confer a benefit on the public at large.

Plaintiffs claim they are third-party beneficiaries of certain broad assurances made by the county and contained in the grant agreement, to the effect that the county will operate the airport safely and will control surrounding airport hazards.[4] However, these contract assurances appear to be nothing more than the assurances required by 49 U.S.C.A. § 1110.[5] I can

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[4] These assurances provide in pertinent part:

> The Sponsor will operate and maintain in a safe and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes.
>
> In addition, the Sponsor will not erect or permit the erection of any permanent structure or facility which would interfere materially with the use, operation, or future development of the Airport, . . .
>
> Insofar as is within its power to the extent reasonable, the Sponsor will take action to restrict the use of land adjacent to or in the vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.

[5] 49 U.S.C. § 1110 provides in pertinent part:

> As a condition precedent to his approval of a project under this chapter, the Administrator shall receive assurances in writing, satisfactory to him, that
>
> . . . . . .

find nothing in the language of the contract or the legislative history of 49 U.S.C.A. § 1110 to indicate that the purpose of these assurances was to create a cause of action on behalf of injured third-parties. In fact, the only remedy provided in the grant agreement for breach of these assurances is termination of the grant by the United States. As in *United States v. Mahler, supra*, it appears that the only purpose of these assurances was to make sure that federal funds were effectively employed and not wasted.

Other courts, in considering third-party claims under the Federal Airport Act, 49 U.S.C.A. § 1101 et seq., and the various agreements and assurances entered into pursuant to that act, have concluded that, although the act might incidentally benefit users of airports, both airlines and passengers, the primary purpose of the act was to establish a nationwide system of public airports adequate to meet the present and future needs of civil aviation. *Port of New York Authority v. Eastern Air Lines, Inc.*, E.D.N.Y. 1966, 259 F.Supp. 745; *San Francisco v. Western Air Lines, Inc.*, 1962, 204 Cal. App.2d 105, 22 Cal.Rptr. 216; *Eastern Air Lines v. Town of Islip*, 1962, Sup., 229 N.Y.S.2d 117. There is nothing to indicate an intent to compensate members of the public injured through the use of the airport.

The majority finds that "not only must the parties have intended to benefit the public, but they also must have intended

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(2) such airport and all facilities thereon or connected therewith will be suitable operated and maintained, with due regard to climatic and flood conditions;

(3) the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

. . . . . .

to compensate members of the public who are injured as a result of a breach." I find no support for the second conclusion. It is based not on the language of the contract or the legislative history, but merely on a relatively few state cases which, as outlined above, are not controlling. I am unwilling to create a cause of action based on such a thin thread. I would therefore affirm the judgment of the district court.

APPENDIX C

In the United States District Court for the Northern District of Georgia, Atlanta Division

George Henson Miree, et al.
vs.
United States of America, et al.
} Civil Action No. 19293

ORDER

(Filed in Clerk's Office September 25, 1974)

This action was brought by George Miree, Claude Miree, and Dorothy Miree through their co-guardians against the United States of America, DeKalb County, Georgia, Machinery Buyers Corporation, and Southeast Machinery, Inc. for the death of their parents. In a prior order of this court, *Miree v. United States*, Civ. No. 19293 (N.D. Ga., June 27, 1974), DeKalb County was dismissed as a party defendant for plaintiffs' failure to state a claim. Fed.R.Civ.P. 12(b)(6). This court rested its decision upon DeKalb County's governmental immunity from suit. The case is now before the court on the motion of Southeast Machinery, Inc. and Machinery Buyers Corporation for reconsideration of this ruling.

Briefly stated, the case arises out of an aircraft crash which occurred shortly after takeoff from the DeKalb-Peachtree Airport in DeKalb County, Georgia. All persons aboard the aircraft were killed, including plaintiffs' parents. The complaint alleges that numerous birds swarmed over the airport and adjacent garbage dump maintained by DeKalb County, and that the turbine engines of the aircraft ingested a large number of these birds resulting in the sudden loss of power in both engines and the crash of such aircraft. Based upon these allega-

tions, plaintiffs claim that both the United States and DeKalb County were negligent in the maintenance and operation of the airport. It was further alleged that DeKalb County is liable for a public nuisance in the maintenance of a garbage dump near the airport and that plaintiffs as third-party beneficiaries may recover for DeKalb County's breach of a contract with the United States in failing to adequately maintain the airport for the benefit of the public. To these claims DeKalb County filed a motion to dismiss which this court granted. Although various arguments were raised by the parties, the court determines the basic issue to be whether plaintiffs' claims are maintainable against DeKalb County in light of the doctrine of governmental immunity.

Pursuant to statutory authority, counties in Georgia enjoy the cloak of governmental immunity. *See Seymore v. Elbert County*, 116 Ga. 371 (1902). Ga. Code § 23-1502 provides that "[a] county is not liable to suit for any cause of action unless made so by statute." Consistent with this statute, the Georgia courts have required parties filing suit against a county to show the appropriate statutory authority allowing a claim. As was stated in *Millwood v. DeKalb County*, 106 Ga. 743 (1899):

> The county, being a political division of the state is not liable to be sued, unless special authority can be shown, and it is incumbent upon the person filing the suit to bring his case within the legislative authority upon which he relies to bring suit.

Id. at 747. Notwithstanding this interpretation, the movants, relying upon *Caroway v. City of Atlanta*, 85 Ga.App. 792 (1952), *Taylor v. King*, 104 Ga.App. 589 (1961), and *Southern Airways Co. v. DeKalb County*, 102 Ga.App. 850 (1960), urge this court to adopt the view that a county can be held accountable when acting in a proprietary capacity such as DeKalb County's operation of the DeKalb-Peachtree Airport. Although

the court sympathizes with this view, it cannot so read the cited cases. Both *Caroway* and *Taylor* involved suits against municipalities which have distinctive liabilities not applicable to counties. *Ware County v. Cason*, 189 Ga. 78 (1939). This distinctive liability is set forth in Ga. Code § 69-301 which provides that municipalities shall be liable for "improper or unskillful performance of their ministerial duties . . ." *See generally Troup County Electric Membership Corp. v. Georgia Power Co.*, 229 Ga. 348 (1972). Neither the statutes or Georgia courts have made such a distinction between governmental and proprietary functions with respect to a county's liability under facts such as are presented here. As was clearly stated in *Ware County v. Cason*, 189 Ga. 78, 79 (1939):

> There is a statute which, on the basis of distinction between governmental function of municipal corporations and ministerial acts, inhibits municipal liability for damages flowing from breach of duty in regard to the former, and imposes municipal liability for breach of duty in regard to the latter. (citations omitted). But there is no such statute relating to counties and no statute making a county liable to suit for tort based on negligence in operating a hospital . . .

Movants further argue that in *Southern Airways* the Georgia court is moving away from the traditional doctrine of governmental immunity. The court cannot agree. *c.f. Crowder v. Department of State Parks*, 228 Ga. 436 (1971); *see Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga.Ct.ofApp. 1974). Although there is more language in *Southern Airways* which supports movants' position, the case involved merely a declaration of rights of the parties under a lease agreement. This is a reiteration of the rule set out in *Decatur County v. Prayton, Howton & Wood Contracting Co.*, 163 Ga. 929, 934 (1927), that

> [w]henver a county . . . is authorized by statute to contract, and in pursuance of such power does contract, then an action will lie against it to enforce such liability . . . although there is no statute authorizing the bringing of an action for such purpose.

This court also finds that movants' reliance upon *DeKalb County v. McFarland*, 223 Ga. 196 (1967), is misplaced. *McFarland* fell within the Georgia constitutional provision holding a county liable for damage to private property taken for public uses, *see* Ga. Code § 2-301; *Smith v. Floyd County*, 85 Ga. 420 (1890), and is distinguishable. Accordingly, the court reaffirms its prior holding that plaintiffs' claim of damages resulting from the alleged nuisance fails to set forth a claim against DeKalb County. *State Highway Department v. Barrett*, 124 Ga.App. 703 (1971); *Crowder v. Department of State Parks*, 228 Ga. 436 (1971); *Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga.Ct.of App. 1974).

For the foregoing reasons, the motion of Southeast Machinery and Machinery Buyers Corporation to set aside the prior order dismissing DeKalb County having been considered, it is hereby DENIED.

Inasmuch as the question of DeKalb County's liability to suit involves a controlling question of law upon which the respective liabilities of the parties rest, and there appear to be substantial grounds for differing opinions, an immediate appeal from this order will materially advance the ultimate determination of the litigation. For this reason the court sees no just reason for delay and directs the Clerk to enter final judgment dismissing DeKalb County from this case.

IT IS SO ORDERED this 24th day of September, 1974.

WILLIAM C. O'KELLEY
United States District Judge

Final Judgment Pursuant to Rule 54(b)

An Order having been signed by Judge William C. O'Kelley on June 27, 1974 and filed in the Clerk's office on June 27, 1974 granting the motion of Defendant DeKalb County to dismiss the complaint for failure of plaintiffs to state a claim, further, the motion by Defendants Southeast Machinery and Machinery Buyers Corporation to set aside prior order dismissing DeKalb County filed on July 3, 1974, having been denied by Order of the Court dated filed on September 25, 1974, the Court having directed entry of final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and thus having certified that there is no just reason for delay, and expressly directing entry of final judgment on said complaint against the plaintiffs, it is

ADJUDGED that the action be dismissed as to the Defendant DEKALB COUNTY, that the plaintiffs, GEORGE HENSON MIREE, CLAUDE ESTES MIREE and DOROTHY ESTES MIREE, Minors, by and through AUBREY S. MIREE, JR. and CLAUDE H. ESTES, JR., Co-Guardians of said Minors, take nothing and that the taxation of costs in the action shall await entry of final judgment as to all defendants.

This 25th day of September, 1974.

APPENDIX D

United States District Court
Northern District of Georgia
Atlanta Division

George Henson Miree, et al.,	Civil Action
vs.	No. 19293
United States of America, et al.	

ORDER

(Filed in Clerk's Office June 27, 1974)

This action was brought by George Miree, Claude Miree, and Dorothy Miree through their co-guardians against the United States of America, DeKalb County, Georgia, Machinery Buyers Corporation, and Southeast Machinery, Inc. for the wrongful death of their parents. Jurisdiction exists in the action against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b)[1], and in the action against DeKalb County, Machinery Buyers Corporation, and Southeast Machinery, Inc. pursuant to 28 U.S.C. § 1332.[2] The case is now before the

---

[1] 28 U.S.C. § 1346(b) provides in part:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or admission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

[2] 28 U.S.C. § 1332 provides in part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds $10,000 . . . and is between—(1) citizens of different states . . ."

Court on defendant DeKalb County's motions to strike and dismiss the plaintiffs' complaint. Also before the Court is plaintiffs' motion to amend the complaint to add a party and to compel discovery.

The case arises out of an aircraft crash which occurred shortly after takeoff and approximately two miles southwest of the DeKalb-Peachtree Airport in DeKalb County, Georgia. All persons aboard were killed, including plaintiffs' parents. A short time after the crash, there were found the remains of several dead birds near the end of the airport runway from which the aircraft departed. Also discovered were numerous birds swarming over the airport and the adjacent garbage dump, maintained by defendant DeKalb County. The complaint alleges that the turbine engines of the aircraft ingested a large number of these birds, resulting in the sudden loss of power in both engines and the crash and total destruction of said aircraft. The plaintiffs claim that the United States, through its agency, the Federal Aviation Administration, and defendant DeKalb County, knew of the existing bird hazard at the airport, in that, such bird hazard had existed for a substantial period of time prior to the crash. Notwithstanding this knowledge, defendants failed to warn and notify jet pilots of the dangerous and unsafe bird hazard that was in existence and negligently failed to take adequate precautions and safeguards to prevent birds from contacting flying aircraft. Based upon these allegations, the plaintiffs claim that both the United States and DeKalb County were negligent in the maintenance and operation of the airport. It is further alleged that DeKalb County is liable for a public nuisance in the maintenance of a garbage dump near the airport and the plaintiffs as third-party beneficiaries may recover for breach of a contract with the United States in failing to adequately maintain the airport for the benefit of the public.[a]

[a] There is now pending in this Court five additional cases related to the Lear Jet crash near DeKalb-Peachtree Airport on February 26, 1973: (1) *United States of America v. A. C. Guhl,* Civ. No. 17968 (N.D. Ga., 1973), which involves an attempt by the United States to prohibit DeKalb County from continuing to maintain a hazard near an airport in the form of a garbage dump; (2) *Fields v. United States,* (N.D. Ga., Filed Feb. 20, 1974), which involves a person entering his automobile and burned by the crash of the Lear Jet. These cases will be consolidated with the present action for discovery purposes; (3) *Fireman's Fund Insurance Company v. United States of America,* Civ. No. C74-24A (N.D. Ga. filed Feb. 20, 1974), which involves a property damage claim filed by the insured of the Lear Jet to recover for the total destruction of the aircraft and; (4) *Chaisson v. Southeast Machinery, Inc.,* Civ. No. 74-915 (N.D. Ga., filed May 10, 1974), for property damage caused by the air crash, and, (5) *Phillips v. United States,* Civ. No. 19412 (N.D. Ga. Nov. 28, 1973) which involves a wrongful death claim by the wife of co-pilot of the aircraft.

I. Plaintiffs' Motion to Amend and Add a Party

Plaintiffs have moved to amend their complaint adding American Home Assurance Company as a defendant. Inasmuch as this Court has granted a motion to dismiss a similar claim against American Home Assurance Company in *Fields v. United States of America,* Civ. No. 74-291 (N.D. Ga., June 27, 1974), the Court will deny the motion to add a defendant.

In *Nelms v. State Farm Mutual Automobile Insurance Co.,* 463 F.2d 1190 (5th Cir. 1972), the Fifth Circuit, faced with the question of whether one can directly sue an insurance company in a Texas District Court based upon a Louisiana "direct action" statute, stated:

> The question of whether or not a direct action against an insurer is permitted is sufficiently determinative of the outcome of a trial that a Federal Court sitting in diversity jurisdiction must follow State law in making its decision.

Id. at 1191. Accordingly, it follows that this Court must apply the law of Georgia in ruling on this motion.

The insurance contract in question was issued to the Board of Commissioners of DeKalb County as the insured. This policy

contained what is commonly known as a "no-action" clause providing in part:

> No action shall lie against the company . . . until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement between the insured, the claimant and the company . . . Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

In the case of *Arnold v. Walton*, 205 Ga. 606 (1949), the Georgia Supreme Court ruled on a suit against an insurance company which contained a similar "no-action" clause. The Court found no Georgia statute allowing the joinder of a tortfeasor with the indemnity company in the same action. It further held that there is no law which permits "the bringing of the action against the insurance company alone, without the liability of the insured having been fixed by judgment or by settlement under the terms of the contract." *Id.* at 613. By the terms of the present policy, the contract is between the insured and the insurance company only. There appears to be no intent to directly benefit the public. Likewise, as the Court interprets the waiver clause, it was not for the public's protection but rather for the County's protection against the raising of such defense once judgment had been entered against it.

Accordingly, this Court finds that plaintiff has no present claim against American Home Assurance Company and hereby denies its motion to amend.

II. **Plaintiffs' Discovery Motions**

Plaintiffs have filed a motion to require DeKalb County to answer certain of plaintiffs' first interrogatories and to determine the sufficiency of DeKalb County's objection to plaintiffs' request for admissions. These motions are denied, without prejudice to refile, for failure to comply with Local Court Rule 91.6.

III. **Motion to Strike**

Defendant DeKalb County has moved to strike various paragraphs of plaintiffs' complaint for failing to state a claim either in negligence, nuisance, or for breach of contract. The Court particularly notes that defendant's motion to strike is based upon the ground that portions of plaintiffs' complaint fail to state a claim upon which relief may be granted. Such a ground for a motion to strike is clearly inappropriate under Fed.R.Civ.P. 12(f). The purpose of rule 12(f) is to simplify and limit the pleadings by an elimination of any "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *See Nuccio v. General Host Corp.*, 53 F.R.D. 234 (E.D. La. 1971). The defendant fails to enumerate these grounds in its motion. The substantive arguments made by defendant are more appropriately made in a motion to dismiss under rule 12(b)6 and will be treated as such by the Court. Accordingly, the request to strike is denied.

IV. **Motion to Dismiss**

The plaintiffs' complaint, as it pertains to DeKalb County, bases an alleged right of recovery on the theories of nuisance, negligence, and breach of contract. To these claims DeKalb County has filed a motion to dismiss for failure to state a claim. Fed.R.Civ.P. 12(b)6. Although various arguments are raised by the parties, the Court determines the basic issue to be whether plaintiffs' claims are maintainable against DeKalb County in light of the doctrine of governmental immunity as it exists in Georgia. This issue will be discussed in the context of plaintiffs' claims.

A. **Nuisance.**

Plaintiffs contend that DeKalb County is guilty of the maintenance of a public nuisance—a garbage dump adjacent to and contiguous with the airport; that DeKalb County knew and realized for a significant period of time that said nuisance constituted a hazard to aircraft landing and departing from the airport and that as a result of said nuisance special damage has been sustained by plaintiffs through the death of their parents. In response to these contentions the defendant urges that Ga. Code § 23-1502 bars any action against a county for maintenance of a nuisance.

Pursuant to statutory authority, counties in Georgia enjoy the cloak of governmental immunity. Ga. Code § 23-1502 provides that "[a] county is not liable to suit for any cause of action unless made so by statute." With this statutory basis the Georgia courts have required the party filing suit to show the appropriate statutory authority allowing a claim. As stated in *Millwood v. DeKalb County*, 106 Ga. 743 (1899):

> The county, being a political division of the state is not liable to be sued, unless special authority can be shown, and it is incumbent upon the person filing the suit to bring his case within the legislative authority upon which he relies to bring suit.

Id. at 747. *See also Seymore v. Elbert County*, 116 Ga. 371 (1902); *Anderson v. DeKalb County*, 107 Ga.App. 328 (1963); *Ayers v. Franklin County*, 73 Ga.App. 207 (1945). This view was recently reaffirmed in the revised opinion of *Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga. Ct. of App., June 19, 1974), decided by the Georgia Court of Appeals. In *Sheley* the plaintiff brought suit against the Board of Education for Chatham County to recover for her child's death, allegedly caused by falling into an open septic tank located on school property.

In ruling upon a motion to dismiss, the Court, in its revised opinion, refused to allow a nuisance or negligence claim against governmental subdivisions other than municipalities. This holding appears to be in accordance with the rulings of the Georgia Supreme Court. *Cf. Crowder v. Department of State Parks*, 282 Ga. 436 (1971).

Plaintiffs' reliance upon *Nalley v. Carroll County* 135 Ga. 835 (1911), and *DeKalb County v. McFarland*, 223 Ga. 196 (1967), appears to be misplaced. Both cases fall within the constitutional provision holding a county liable for damages to private property taken for public uses. *See* Ga. Code § 2-301. These suits are expressly authorized and fall within the statutory exception provided for in Ga. Code § 23-1502, *See Purser v. Dodge County*, 188 Ga. 250 (1939), and are not applicable to the present case.

B. **Breach of Contract.**

Plaintiffs, in their complaint, contend that DeKalb County executed six Federal Grant Agreements with the United States. Pursuant to the terms of these agreements DeKalb County obligated itself to perform certain duties with regard to the use and maintenance of the airport, as well as the land adjacent thereto. Plaintiffs further averred that DeKalb County violated this agreement by permitting a garbage dump to be maintained in the vicinity of the airport. As a consequence of the breach of this contract, plaintiffs' parents lost their lives in an attempt to take off from the airport. Based upon these allegations, plaintiffs claim that their parents were third-party beneficiaries to the Grant Agreement and that they may now maintain an action against DeKalb County for breach of contract.

Although the party's briefs discuss the question of the intent of each party to create third-party beneficiary rights, the Court conceives the issue to be much narrower *i.e.* whether sovereign

immunity acts as a bar to suit against the county for breach of its contract with the Federal Government. This question appears to have been answered in *Purser v. Dodge County*, 188 Ga. 251 (1939). In *Purser* a question was certified to the Georgia Supreme Court on whether a county was liable in damages to a highway traveler caused by the negligence of the county in performing its contract with the State Highway Department for paving of a highway. *Id.* at 251. The Court after discussing the effect of the doctrine of governmental immunity on suits against counties for their negligence concluded:

> [T]here is no constitutional or statutory provision which can be taken to render a county liable for a tort on account of personal injuries arising from a defect in a highway constructed or maintained by the county; and this is true irrespective of whether the construction or repairs of the highway was done in the performance of the county's own governmental functions in maintaining its system of highways, *or whether it was done, as stated in the certified question, under a contract made by the county with the State Highway Department solely for pecuniary gain.* (emphasis added).

Id. at 252.

Inasmuch as this Court must follow the law of Georgia in this diversity suit, the Court finds that any claim by plaintiffs for damages resulting from the breach of the contract between DeKalb County and the United States is barred by governmental immunity. By so holding, it is unnecessary for the Court to reach the question of whether plaintiffs can recover as a third-party beneficiary under the contract in question.

C. **Negligence**

The plaintiffs' remaining claim against DeKalb County is based upon negligence in the operation and maintenance of

the DeKalb-Peachtree Airport. As previously discussed with regard to the nuisance allegation, the doctrine of governmental immunity bars this claim. Nevertheless, plaintiffs, relying upon *Caroway v. City of Atlanta*, 85 Ga.App. 792 (1952), and *Taylor v. King*, 104 Ga.App. 589 (1961), urges that a county can be held accountable for negligence when acting in a ministerial or proprietary function. Both *Caroway* and *Taylor* involved municipalities which have distinctive liabilities in Georgia not applicable to counties. In *Troup County Electric Membership Corp. v. Georgia Power Co.*, 229 Ga. 348 (1972), this distinction was explained.

> 'Counties are subdivisions of the State Government to which the state parcels its duty of governing the people (citations omitted). They are local, legal, political subdivisions of the State . . . administrating locally the general powers and policies of the State . . .'. On the other hand, municipalities are creatures of the Legislature, and their existence may be established, altered, amended, enlarged or diminished, or utterly abolished by the legislature. Id. at 352.

See also Purser v. Dodge County, 188 Ga. 250 (1939); *Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga. Ct. of App., 1974); *Ware County v. Carson*, 189 Ga. 78 (1939). This distinction raises a constitutional question as a defense to the motion to dismiss. In this regard, the plaintiffs contend that *Ga. Code* §23-1502 as applied to their action against DeKalb County is unconstitutional as violative of the equal protection and due process clauses of the United States and Georgia Constitution. It is specifically alleged that §23-1502 draws a classification between those persons injured by a municipality's negligence in the operation of an airport and those persons injured by a county in its operation of an airport. The Georgia courts hold that a municipality is not immune from claims for its negligence in the operation of an airport. *See Delta Air Corpora-*

tion v. Kersey, 193 Ga. 862 (1942); *Taylor v. King*, 104 Ga. App. 589 (1961). It is urged that this line of classification discriminates against persons injured by the county with the imposition of the bar of governmental immunity to their actions.

In order for a law to be in violation of the equal protection clause of the fourteenth amendment the state law must be shown to be arbitrary and without reasonable basis: *See Lindsey v. Normet*, 405 U.S. 56 (1972). Thus, even though a statute has the effect of discriminating against a certain class, the law is not arbitrary and violative of equal protection if the discrimination is founded upon a reasonable distinction. Laws similar in scope and effect as the one challenged in the present action have been upheld as a valid exercise of state power. In *Meyerhoffer v. East Hanover Township School District*, 280 F.Supp. 81 (M.D. Penn. 1958), the Court granted immunity from tort liability to a school district for negligent injury to a pupil during the operation of a school bus. This was found not to deny equal protection of the law to the plaintiff notwithstanding the fact that by state statute all owners of private vehicles employed in transporting pupils were required to carry public liability insurance and were liable for their negligence. *See also McDaniel v. Baptist Memorial Hospital*, 469 F.2d 230 (6th Cir. 1972); *Weeks v. Children's Hospital of Philadelphia*, 200 F.Supp. 77 (E.D. Pa. 1961). Likewise, in the present case the Court finds the classification to be based upon a reasonable legislative purpose. The Georgia courts consistently have held that the county is created "as an arm of the state." *See Troup County Electric Membership Corp. v. Georgia Power Co.*, 229 Ga. 348 (1972). As such, they carry the state's burdens and responsibilities within their respective localities. On the other hand, a municipality, as a legislative creation, can select its available powers, rejecting those liabilities inapplicable to its particular purpose. Undoubtedly, the differentiation in respective liabilities premised on this distinction is reasonable. While it must be conceded that DeKalb

County has by operating an airport extended its activities into areas beyond its traditional function, this Court is unable to find that the distinctive classification is totally unrelated to the purpose of §23-1502. Likewise, finding the classification to be reasonable, the plaintiffs' due process claim is also without merit. The result reached in this case under the Federal Constitution is also applicable to the plaintiffs' argument under the Georgia Constitution. *See Crowder v. Department of State Parks*, 228 Ga. 436 (1971), *cert. denied*, 406 U.S. 914 (1972).

In summary, the Court (1) denies DeKalb County's motion to strike portions of plaintiffs' complaint, (2) grants DeKalb County's motion to dismiss plaintiffs' complaint as to its claims of negligence, nuisance and for breach of contract, (3) denies the plaintiffs' motion to amend the complaint, and (4) denies the plaintiffs' discovery motions without prejudice to refile.

It Is So Ordered this 27th day of June, 1974.

/s/ WILLIAM C. O'KELLEY
United States District Judge

Supreme Court, U. S.
FILED
MAR 2 1977
MICHAEL RODAK, JR., CLERK

JOINT APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

GEORGE HENSON MIREE, *et al.*,
Petitioners,
v.
DEKALB COUNTY, GEORGIA, *et al.*,
Respondents.
No. 76-607

JUDITH ANITA PHILLIPS,
Petitioner,
v.
DEKALB COUNTY, GEORGIA, *et al.*,
Respondents.
No. 76-659

FIREMAN'S FUND INSURANCE COMPANY,
Petitioner,
v.
DEKALB COUNTY, GEORGIA, *et al.*,
Respondents.
No. 76-700

WILLIAM MICHAEL FIELDS,
Petitioner,
v.
DEKALB COUNTY, GEORGIA, *et al.*,
Respondents.
No. 76-722

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED OCTOBER 30 AND NOVEMBER 10, 19 AND 23, 1976
CERTIORARI GRANTED JANUARY 17, 1977

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PART A
APPENDIX
IN
NO. 76-607

GEORGE HENSON MIREE, *et al.*,
Petitioners,

v.

DEKALB COUNTY, GEORGIA, *et al.*,
Respondents.

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date:
1/4/74 deft. & 1/11/74 deftg.

TITLE OF CASE	ATTORNEYS
[illegible]	For plaintiff:
[illegible] and [illegible] by and through [illegible] and [illegible], Co-Guardians of said Minors	[illegible] Jr. [illegible], Jr. [illegible] [illegible] [illegible] ([illegible]) Gilbert E. Johnston Twelfth Floor [illegible] [illegible], Ala. 35203 (205-322-8516)
vs.	For defendant:
UNITED STATES OF AMERICA; [illegible]; SOUTHEAST AIRLINES, INC.; and DEKALB COUNTY, GEORGIA 4/25/74	William D. Wallace Asst. U. S. Atty. [illegible] Atlanta, [illegible] [illegible] Meade Burns & Edwin S. Stone Wendall K. Willard Harvey, Willard & Elliott 125 Trinity Place Decatur, Georgia(also for DeKalb Co.)

SeeSheet 1A for additional counsel.

STATISTICAL RECORD	COSTS		DATE	NAME OF RECEIPT NO.	REC	DISB
J.S. 5 mailed 11/5/73	Clerk	15 00	NOV 5 1973	[illegible]		
			NOV 9 1973	[illegible]	15 00	
J.S. 6 mailed	Marshal	40 56		Trans.U.S.Dep.		15 00
Cause of Action: Wrongful death - aircraft crash	Docket fee		OCT 9 1974	[illegible]	5 00	
	Witness fees		OCT 11 1974	Trans.U.S.Dep.		5 00
Action arose at:	Depositions					

BEST COPY AVAILABLE

DATE	PROCEEDINGS

ADDITIONAL COUNSEL FOR DEFENDANTS

J. Arthur Mozley
Smith, Cohen, Pingel, Kohler,
Martin & Lower
2400 First National Bank Tower
Atlanta, Georgia 30303 658-1200
(for defts., Machinery Buyers Corp. Now known as Semac Industries, Inc.) and Southeast Machinery, Inc.)

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Torts Section, Civil Division
Department of Justice
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For: United States

Long, Weinberg, Ansley & Wheeler
Meade Burns & Edward D. Stone
3000 The Equitable Building
Atlanta, Georgia 30303 (525-5903)
and
Wendell K. Willard
Harvey, Willard & Elliott
125 Trinity Place
Decatur, Georgia (377-3851)
(For DeKalb County, Georgia)

JURY DEMAND

DATE	PROCEEDINGS
Nov. 5	Complaint with attachments, filed.
	Summons issued and delivered to U. S. Marshal.
	$250.00 bond for costs, filed.
	Plft's Request for admission addressed to deft. DeKalb Co., filed.
	Plft's request to produce and permit inspection and copying addressed to the deft. DeKalb, filed.
	Plfts' first interrogs. addressed to deft DeKalb, filed.
	Plfts' requests for admission addressed to deft. DeKalb Co., filed.
	Plfts' Request to produce and permit inspection and copying addressed to deft. DeKalb County, filed.
	Plfts' first interrogs. addressed to deft DeKalb County, filed.
	Requests for admission addressed to deft. Southeast Machinery, Inc., filed.
	Plfts' request to produce and permit inspection and copying addressed to deft. Southeast Machinery, Inc., filed.
	Plfts' first interrogs. addressed to deft. Southeast Machinery, Inc., filed.
	Plfts' request for admission addressed to deft. Machinery Buyers Corp., filed.
	Plfts' request to produce and permit inspection and copying addressed to deft. Machinery Buyers Corp., filed.
	Plfts' first interrogs. addressed to deft. Machinery Buyers Corp., filed. (all of above attached to complaint)
13	Consent order extending time thru 12-24-73 for deft. DeKalb Co. Ga. to answer, etc. the complaint, to respond to pltf's 1st interrogs. & request for admissions, filed. C. furn.
20	ORDER by the Court upon consent of parties ext. time for defts. Machinery Buyers Corp. and Southeast Machinery, Inc. shall have to and thru 12/24/73 to file ans., interrogs., etc., filed. (c. furn.)
Dec. 3	Case reassigned to Judge O'Kelley
17	Marshal's returns on service as to Dekalb Co., Ga.(Horis A. Ward), (W. M. Coolidge, Jr.)(Robert J. Morris)(Hoke Clayton Smith)(T. M. Callaway, Jr)(William A. Williams)(A.C.Guhl) all on 11-6-73; as to Southeast Machinery, Inc. & USA(U.S. Atty) both on 11-6-73; as to Machinery Byers Corp. on 12-13-73, filed.
19	Consent Order extending time thru 1-11-74 for defts. Machinery Buyers Corp. & Southeast Machinery, Inc. to file pleadings & response to Pltf's complaint, interrogs., requsts for admissions & requests for production of documents, filed. C. furn.
21	ORDER that deft. DeKalb County shall have thru 1/4/74 within which to file ans., ans. to interrogs., etc., filed.(c. counsel) ORDER that deft. USA shall have thru 2/15/74 to respond or object to plfts' requests for discovery, filed.(c. furn.)
1974	
Jan. 4	ANSWER of Deft. DeKalb County with JURY DEMAND, filed.
	Deft. DeKalb County's Motion to Dismiss, filed.
	Deft. DeKalb County's Motion to Strike, filed.
	Brief in Support of DeKalb County's Motions to Dismiss & Strike, filed.
	Deft. DeKalb County's Responses and Objections to Pltf's First Interrogs., and Motion for Protective Order, filed.
	Deft. DeKalb County's Responses and Objections to Pltf's Request for Admissions and Motion for Protective Order, filed.
	Brief In Support of DeKalb County's Objections to First Interrogs, filed.

et.al.

SHEET # 2

vs

UNITED STATES OF AMERICA et.al. JURY DEMAND

1974	PROCEEDINGS
Jan 4	Brief in Support of DeKalb County's Objections to Pltf's Request for Admissions, filed.
7	Consent Order ext. time thru 2-15-74 for deft United States to respond to the complaint, filed. (copy to counsel 1-9)
	Consent Order ext. time thru 1-31-74 for pltfs' to file responses and briefs to deft Dekalb County's motion to dismiss, deft Dekalb County's motion to strike, objections of deft Dekalb to pltfs' first interrogs., and objections of deft Dekalb to pltfs' requests for admission, filed. (copies furn)
11	ANSWER of defts. Machinery Buyers Corp. and Southeast Machinery, I... & DEMAND FOR JURY TRIAL, filed.
	Deft. Machinery Buyers Corp.'s answers to pltfs' requests for admis... filed.
	Deft. Machinery Buyers Corp.'s answers to pltfs' first interrogs., filed.
	Deft. Machinery Buyers Corp.'s response to pltfs' request to produ..., etc., filed.
	Deft. Southeast Machinery, Inc.'s answers to pltfs' requests for ndmission, filed.
	Deft. Southeast Machinery, Inc.'s answers to pltfs' 1st interrogs., filed.
	Deft. Southeast Machinery, Inc.'s response to pltfs' request to pro-duce, etc., filed.
17& 22	Pltf's motion to amend & add a party, brief in support & proposed Order, filed.(1st amendment to complaint attached.)
28	Deft. DeKalb County's Supplemental Brief, filed.
29	Brief of pltfs' in oppostion to motions of deft. Dekalb County to dismiss and to strike, filed.
	Motion to require deft. Dekalb County, Ga. to answer more fully certain of pltfs' first interrogs. and to answer certain of such interrogs. which were not answered with brief, filed.
	Motion of pltfs' to determine the sufficiency of deft. Dekalb County's objections to pltfs' requests for admission, for an order overruling said objections and requiring deft. to respond to said requests and for an award of expenses with brief, filed.
31	Order allowing Dekalb County up to and including Feb. 11 in which to file responses and briefs to Motion to amend and add party defts. and responsive pleadings to pltf's amended compliant, filed. Counsels
	Response of defts. Machinery Buyers Corp. and Southeast machinery, Inc. to pltf's motion to amend and add a party and pltfs' 1st. amendment to comp., filed.
31	SUBMITTED ON DEFT. DEKALB COUNTYS MOTION TO DISMISS, MOTION TO STRIKE; MOTION FOR PROTECTIVE ORDER
Feb. 11	Consent Order by Clerk extending timenthru 2-15-74 for deft. DeKalb Co. to respond to pltf's motion to amend & add party defts. & responsive pleadings to pltf's amended complaint, filed. C. furn. WCO
13	Pltfs' second interrogs. to deft Machinery Buyers Corp., filed. To WCO
15	Deft. U.S.A.'s ANSWER, Crossclaim and Counterclaim, filed.
	Deft. U.S.A.'s Answers to Pltfs' First Interrogs.,filed.
	Deft. U.S.A.'s Response to Pltfs' Request to Produce...,filed.
	Deft. U.S.A.'s Response to Pltfs' Request for Admission, filed.
	Deft. U.S.A.'s First Interrogs., to Aubrey S. Miree, Jr. and Claude H. Estes, Jr., filed. (all above to WCO)

DATE	PROCEEDINGS
Feb. 15	ANSWER of Dekalb County, Ga. to first amended corplaint of pltfs, filed.
	Brief in opposition to pltfs' motion to determine the sufficiency of Dekalb County's objections to pltf's requests for admission and motion to more fully answer certain of pltf's interrogs., filed.
21	Brief of Dekalb County, Georgia in opposition to pltf's motion to amend and add a party, filed.
21	Dekalb Countys Motion to dismiss the amended complaint, filed.
21	Dekalb Countys motion to strike allegations from the amended complaint, filed.
21	Dekalb Countys second supplemental brief with exhibits, filed.
20	Pltf's 2nd request to produce & permit inspection and copying addressed to the deft. United States of America, filed. To WCO
21	ANSWER of pltf's to counter-claim of deft. U. S. A., filed.
25	SUBMITTED ON PLTF'S MOTION TO AMEND AND ADD A PARTY; PLTFS. MOTION TO REQUIRE DEKALB COUNTY TO ANSWER MORE FULLY PLTFS. 1st. interrogs.AND TO ANSWER CERTAIN OF SUCH INTERROGS; MOTION OF PLTF. TO DETERMINE THE SUFFICIENCY OF DFTT. DEKALB COUNTYS OBJECTIONS TO PLTFS. REQUESTS FOR ADMISSION, FOR AN ORDER OVERRULING SAID OBJECTIONS AND REQUIRING DEFT. TO RESPOND TO SAID REQUESTS FOR AN AWARD OF EXPENSES.
22	ANSWER of Machinery Buyers Corp. and Southeast Machinery, Inc. to the cross-claim of Deft. United States of America, filed. WCO
25	Memorandum in opposition to Dekalb County's motion to dismiss as to the cross-claim of the U. S. filed, by U.S.. WCO
	Pltf's brief in opposition to motions of deft. USA to consolidate, filed.(motion filed in companion cases & refers to this case) To WCO
27	Pltf's brief in response to brief of Dekalb Co., Ga. in opposition to pltf's motion to amend and add party, filed. ToWCO
27	Amendment of "Response of Defts. Machinery Buyers Corp. and Southeast Machinery, Inc. to Pltfs' motion to amend and add a party and pltfs' first amendment to complaint, filed. WCO
	ANSWER of Dekalb County, Georgia to Cross-Claim of deft USA, filed.(with JURY DEMAND) To WCO
March 5	Notice of appearance of George M. Fleming, Torts Section, Civil Section, U. S. Department of Justice, Washington, D. C. as additional counsel for the U. S., filed. To WCO
12	SUBMITTED ON DEKALB COUNTY'S MOTION TO DISMISS THE AMENDED COMPLAINT & MOTION TO STRIKE ALLEGATIONS FROM THE AMENDED COMPLAINT
15	Consent Order extending time thru 4-1-74 for deft. Machinery Buyers Corp. to answer pltf's 2nd interrogs., filed. C. furn. To WCO
18	Answers of pltf's to first interrogs. propounded by deft. U.S.A. with exhibits, filed. WCO
25	Response to pltfs' 2nd. request to produce and permit inspection and copying addressed to the deft. United States of America, filed WCO
27	Deft. Machinery Buyers Corp. ANSWERS to pltf's second interrog's. filed. WCO
	Deft's Machinery Buyers Corpl & Southeast Machinery, Inc. response in opposition to motions to dismiss & strike filed by DeKalb County To WcO

Next sheet

1974	PROCEEDINGS
APRIL 2	Second interrog's propounded by the deft, USA, pursuant to rule of the federal rules of civil procedure, to pltfs Aubrey S. Miree, Jr., and Claude H. Estes, Jr., filed. To WCO
8	Deft. DeKalb County, Ga's 3rd supplemental brief, filed. To WCO
10	Further ANSWERS of pltfs to first interrogs propounded by defts, filed.
12	Deft. USA's First Request toProduce and permit Inspection and Copying Addressed to Pltfs., filed. WCO
23	Pltfs' Second Interrogs., to deft. U.S.A., filed. WCO
	Pltfs' Second Requests for Admission to deft. U.S.A., filed. WCO
24	Answers of pltfs. to second interrogs. of deft. U.S.A., filed.
	Pltfs' Motion To Amend, with Brief, Proposed Order & Pltfs' 2nd Amendment to Complaint, filed.
	Pltfs' Supplemental Brief in opposition to motions of deft to dismiss & to strike, filed.
30	Answer and Response of Defts Machinery Buyers and Southeast Machinery, to Pltf's Second Amendment to Complaint, filed. To WCO
May 2	Consent Order by Clerk extending time thru 5-20-74 for DeKalb Co. to file response to pltf's motion for 2nd amendment to complaint,filed. To WCO. copies furn.
14	Deft USA's ANSWER to pltfs' 2nd Amended Complaint, filed. WCO
	Deft DeKalb County, Georgia's Motion To Dismiss and/or motion to strike allegations from the 2nd amended complaint of pltf., with brief, filed. WCO
	ANSWER of DeKalb County, Georgia to 2nd amended complaint of pltfs., with JURY DEMAND, filed. WCO
15	Amendment of deft. Machinery Buyers Corp. and Southeast Machinery, Inc of previously-filed answers to pltf's requests for admissions and Pltfs' 1st. interrogs., filed. WCO
16	Deft Machinery Buyers Corp. and Southeast Machinery, Inc.'s Amendment to Answer, filed.(with ORDER allowing same) copy to counsel To WCO
29	SUBMITTED ON PLTFS' MOTION TO AMEND.
30	Consent Order extending time thru 6-12-74 for deft. USA to respond to pltf's interrogs. & request for admission, filed. c. furn. WCO
June 4	SUBMITTED ON DEFT. DEKALB COUNTY, GEORGIA'S MOTION TO DISMISS AND/OR STRIKE ALLEGATIONS FROM THE 2ND AMENDED COMPLAINT.
11	Consent ORDER by WCO ext. time thru 6/26/74 for deft. U.S.A. to answer, respond, etc.. to pltfs' Interrogs., and Request for Admissions, filed. (copies to counsel 6/12) To WCO
20	Deft DeKalb County's supplemental brief in support of motions to dismiss and strike, filed. WCO
27	ORDER filed - DENYING DeKalb Co's motion to strike portions of pltfs' complaint; GRANTING DeKalb Co's motion to dismiss pltfs' complaint as to its claims of negligence, nuisance & for breach of contract; DENYING pltfs' motion to amend the complaint; and DENYING pltfs' discovery motions without prejudice to refile. (copy to counsel, 6/27) U S's cross-claims against DeKalb County still pending
26	Consent Order ext. time thru 7-10-74 for deft to respond to pltfs' interrogs. and requests for admission, filed. (CF)
JULY 3	Motion of Southeast Machinery, Inc., Machinery Buyers Corp. and Fireman's Fund InsuranceCompany to vacate, set aside, alter and amend the orders entered on June 27, 1974 and for reconsideration rehearing and new trial and memo in support, filed.

CONT.

D C 110A Rev. Civil Docket Continuation

DATE 1974	PROCEEDINGS
July 12	Brief of DeKalb Co., Ga. in opposition to the motions of Southeast Machinery, Inc., Machinery Buyers Corp., and Fireman's Fund Ins. to set aside, Vacate, Amend & alter the orders or for reconsideration rehearing, and new trial on the orders entered on 6-27-74, filed.
15	Response to pltf's 2nd request for admission addressed to defts. filed.
22	Supplemental brief of DeKalb Co, Ga in opposition to various motions filed by Southeast Machinery, Inc., et al, filed. (with attachment)
23	Pltfs' third interrogs to deft U S of A, filed.
29	SUBMITTED ON DEFTS' SOUTHEAST MACHINERY, INC., MACHINERY, INC., MACHINERY BUYERS CORP., & FIREMAN'S FUND INSURANCE CO.'S MOTION TO VACATE, SET ASIDE, ALTER AND AMEND THE ORDER OF 6/27/74 AND FOR RECONSIDERATION REHEARING AND NEW TRIAL.
31	Deft USA's Request To Produce & Permit Inspection and Copying, filed. (WCO)
	Deft USA's 3rd Interrogs. to the Miree Pltfs', filed. WCO
Aug. 1	Southeast Machinery, Inc., Machinery Buyers Corp. & Fireman's Fund Insurance Co's notice to take depositions, filed. WCO
2	Defts' Supplemental Notice to Take Depositions, w/exhibit A, filed.
5	Deft. U.S.A.'s answers to pltfs' Miree's interrogs., filed. WCO
19	Deft U.S.A.'s memorandum in support of the motion of Southeast Machinery, Inc., Machinery Buyers Corp., & Fireman's Fund Insurance Co.'s to vacate, set aside, alter and amend the orders entered on 6/27/74 and for reconsideration, rehearing & new trial, filed. WCO
20	Response of Machinery Buyers Corp., and Southeast Machinery, Inc., & Fireman's Fund Insurance Co. to the request to produce and permit inspection and copying filed by the USA, filed. WCO
22	ANSWERS of pltfs. to 3rd interrog. propounded by deft., United States of America, filed. WCO
27	United States' ANSWERS to the Miree pltf's 3rd interrog., filed. WCO
Sept. 4	Deft's request for production of documents, filed. WCO
25	ORDER that motion of Southeast Machinery & Machinery Buyers Corp. to se aside prior order dismissing DeKalb Co. is denied, there appear to be substantial grounds for differing opinions, as to...appeal ...will.. advance...litigation, the Clerk is directd to enter final judgment dismissing DeKalb County from this case, filed. (CF)
26	JUDGMENT filed and entered that the plaintiff take nothing, that the action be dismissed as to defendant DeKalb County and that the defendant DeKalb County cost to be taxed when final judg. to all ptys. filed. (CF)
OCT. 9	Pltfs' NOTICE OF APPEAL, OF Order of 9/25/74, filed.(Certified Copy of notice & docket sheet to USCA & copy counsel 10/11)
	$250.00 APPEAL BOND, filed.
10	Deposition of HENRY F. MANGET, JR., filed.
16	Deft, U. S. A's Motion for Partial Summary Judgment w/memorandum and exhibits, filed.
	Consent Order by Clerk extending time through December 2, 1974 for pltfs to respond to Motion for Partial Summary Judgment. filed. (CF)
	Letter from pltf's counsel regarding correspondence & notice of Election to defer Appendix which they sent to USCA, filed.
18	Pltf's response to deft, United States of America's Request for Production of Documents, w/attachments, filed.
24	Letter and 10/.../74, from Johnston, Barton, Proctor, Swedlaw & Naff with proposed Record On Appeal, filed.

continued

DATE 1974	PROCEEDINGS
Oct. 29	Letter from Long, Weimberg, Ansley & Wheeler to Alan W. Heldman Re: items to be placed in record on appeal, filed.
Nov. 1	Deft. U.S.'s Interrogs to Machinery Buyers Corp and Southeast Machi Inc., filed.
Nov 12	Stipulation of parties to record on appeal pursuant to Rule 11(f), F.RA.P, filed.
Nov 14	ORDER to forward copies of pleadings in accordance with the joint designation of record on appeal, filed. c. counsel.

ATTEST: A TRUE COPY
CERTIFIED THIS
11-14-74
Ben H. Carter, Clerk
By: Lorraine Nalley
Deputy Clerk

BEST COPY AVAILABLE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

[Filed in Clerk's Office Nov. 5, 1973,
Ben H. Carter, Clerk; By: P.J.E. Deputy Clerk.]

GEORGE HENSON MIREE,
CLAUDE ESTES MIREE and
DOROTHY ESTES MIREE, Minors,
by and through AUBREY S. MIREE, JR.
and CLAUDE H. ESTES, JR.,
Co-Guardians of said Minors,

Plaintiffs,

vs.

UNITED STATES OF AMERICA;
MACHINERY BUYERS CORP.;
SOUTHEAST MACHINERY, INC.; and
DEKALB COUNTY, GEORGIA,

Defendants.

CIVIL ACTION NO. 19293

COMPLAINT

Allegations of Jurisdiction

1.

Jurisdiction herein is based upon 28 U.S.C. §§1346(b), and 2671, 2674, and 2675.

2.

Jurisdiction is further founded upon diversity of citizenship.

3.

The minor Plaintiffs herein, GEORGE HENSON MIREE, CLAUDE ESTES MIREE, and DOROTHY ESTES MIREE, are all residents and citizens of the State

of Alabama and are represented herein by AUBREY S. MIREE, JR. and CLAUDE H. ESTES, JR., who were duly appointed Co-Guardians of said minors by the Probate [10] Court of Jefferson County, Alabama. Both of said Co-Guardians of said minors are residents and citizens of the State of Alabama.

4.

Defendants herein are as follows:

(a) UNITED STATES OF AMERICA. Appropriate claims for damages for the deaths of RICHARDSON F. MIREE and LUCY ESTES MIREE were submitted to the United States Department of Transportation, Federal Aviation Administration, Southern Region, 3400 Whipple Street, East Point, Georgia, on May 4, 1973. Since that time, said agency has failed to make a final disposition of the claims within six (6) months, and this Complaint is brought in accordance with the provisions of 28 U.S.C. §2675(a).

(b) DEKALB COUNTY, GEORGIA. Said COUNTY is located within the Northern District of Georgia and within the jurisdiction of this Court. Said Defendant will hereinafter be referred to as DEKALB COUNTY. The fiscal affairs of DEKALB COUNTY are committed to a Board of Commissioners, consisting of A. C. Guhl, Chairman, and William A. Williams, T. M. Callaway, Jr., Hoke Clayton Smith, Robert J. Morris, W. M. Coolidge, Jr. and Horis A. Ward. They will be referred to hereinafter as County Commissioners.

(c) MACHINERY BUYERS CORP., a Georgia corporation, with its principal office and place of doing business at I-20 East Access Road, Conyers, Georgia, with an agent for service, WILLIAM J. RIALS, at said address.

(d) SOUTHEAST MACHINERY, INC., a North Carolina corporation, which can be served by serving STANLEY E. GALKIN, Attorney at Law, at Equitable Building, Atlanta, Georgia 30303. [11] Said Attorney, STANLEY E. GALKIN, will accept service on behalf of said Defendant SOUTHEAST MACHINERY, INC.

The matter in controversy exceeds, exclusive of interest and costs, the sum of TEN THOUSAND ($10,000.00) DOLLARS.

Cause of Action

1.

Plaintiffs herein are GEORGE HENSON MIREE, CLAUDE ESTES MIREE, and DOROTHY ESTES MIREE, all minors. Plaintiffs show that the Defendants herein are jointly and severally liable to Plaintiffs for the full value of the life of their mother, LUCY ESTES MIREE, in the sum of ONE MILLION ($1,000,000.00) DOLLARS, and are jointly and severally liable to Plaintiffs for the full value of the life of their father, RICHARDSON F. MIREE, in the sum of FOUR MILLION FIVE HUNDRED THOUSAND ($4,500,000.00) DOLLARS.

2.

RICHARDSON F. MIREE and LUCY ESTES MIREE died on February 26, 1973, when the Gates Learjet Airplane on which they were riding crashed near the DeKalb Peachtree Airport in DeKalb County, Georgia.

3.

Said Gates Learjet Airplane, Model #24, designated "N454RN," was owned by Defendant SOUTHEAST

MACHINERY, INC. Defendant SOUTHEAST MACHINERY, INC. was and is a subsidiary corporation of Defendant MACHINERY BUYERS CORP., which operated said Gates Learjet by and through its pilot, Ernest F. Sellfors, and its co-pilot, David E. Phillips. The said Sellfors and Phillips were agents and servants of both SOUTHEAST MACHINERY, [12] INC. and MACHINERY BUYERS CORP., and all acts of said Sellfors and Phillips referred to herein were inputable to Defendants SOUTHEAST MACHINERY, INC. and MACHINERY BUYERS CORP.

4.

DeKalb-Peachtree Airport is located within the boundaries of DeKalb County on land owned by the County. Said Airport has paved runways and airport hangers, servicing and parking facilities, a control tower with radio facilities, instrument landing system control center, and access to other radio and navigational aids. The Airport is operated for the public welfare and benefit of the citizens of the UNITED STATES OF AMERICA and is operated under the jurisdiction of the Federal Aviation Administration.

5.

DEKALB COUNTY, GEORGIA, acquired the DeKalb-Peachtree Airport by way of quit-claim deed from the General Services Administration of the UNITED STATES OF AMERICA on February 15, 1960. The County's personnel operated the control tower at the DeKalb-Peachtree Airport from March, 1959, until January, 1963, when they were replaced by Federal Aviation Administration Air Traffic personnel. On February

26, 1973, the date of the fatal crash complained of herein, the tower was operated by Federal Aviation Administration Air Traffic personnel.

6.

Beginning in 1962, a portion of the land constituting the Airport site was used by DEKALB COUNTY as a landfill. In 1964 the dump was closed and remained closed until March, 1966, when it was reopened. Since that time DEKALB COUNTY has [13] utilized the Airport site for dumping refuse.

7.

Employees of DEKALB COUNTY at said DeKalb-Peachtree Airport have observed and reported a significant increase in the number of birds in the vicinity of the Airport following the utilization of the Airport site for garbage disposal.

8.

Prior to February 26, 1973, DEKALB COUNTY had been using the Airport site as a sanitary landfill or garbage dump where large quantities of raw garbage, refuse, offal, filth, waste and trash by the truck loads were dumped and deposited upon the Airport site numerous times during each day by personnel and vehicles controlled by said DEKALB COUNTY through its Sanitation Department and under the ultimate direction and control of the County Commissioners of DeKalb County.

9.

The said untreated raw garbage, refuse, trash, offal, filth and other waste material deposited by the Defendant DEKALB COUNTY as aforesaid have created,

and will create, a large area constituting an attraction to immense flocks of birds which are located about said Airport, the runways, ends of runways, and other areas. Said birds at certain times remain, walk, and run upon said runways and adjacent grass areas at the sides and ends of the runways, and congregate in the numerous trees at the end of said sides of said Airport area and runways. Said birds when located upon the Airport grounds often flew aloft in large flocks many times each day as aircraft would take off, approach, land [14] or fly near said Airport and constituted a continuous hazard at said Airport to the safety of said aircraft and to the safety and lives of the crews and passengers therein and to persons residing and located upon the ground in the vicinity of said Airport.

10.

All of the foregoing was known to the Defendant, DEKALB COUNTY, and to the County Commissioners thereof and their predecessors, and to the Defendant UNITED STATES OF AMERICA, and to the pilots of the Gates Learjet referred to aforesaid.

11.

The UNITED STATES OF AMERICA, through the Federal Aviation Administration, maintained a control tower at said Airport and directed the takeoff and landing of aircraft on February 26, 1973.

12.

The personnel employed by the Federal Aviation Administration operating said control tower on February 26, 1973, did negligently and recklessly allow the Learjet "N454RN" to take off by reason of knowledge that great

flocks of birds were flying in, around and about said Airport site.

13.

The UNITED STATES OF AMERICA, by and through the Department of Transportation, Federal Aviation Administration, had the responsibility for the administration of the Federal Airport Development Aid Program and its predecessor, the Federal Airport Act of 1946. Involved in the administration of the programs was the responsibility of enforcing the provisions of the various Grant Agreements issued in accordance with the provisions of these Acts. These Grant Agreements [15] included provisions under which the airport owners maintain and operate said airports in accordance with the standards said forth in these Agreements.

14.

In addition, the UNITED STATES OF AMERICA had the responsibility for and jurisdiction over the safety of DeKalb-Peachtree Airport to the extent that it was the duty of the UNITED STATES OF AMERICA, as a condition precedent to the granting of funds for Airport development, to receive assurances from the owners of the Airport that airport hazards would be mitigated.

15.

Beginning in June, 1962, the Federal Government has enter into six (6) Grant Agreements with DeKalb County, pursuant to which $1,025,224.06 has been paid to the County for the purpose of assisting the County in the improvement and development of DeKalb-Peachtree Airport.

16.

Associated with the various Grant Agreements is an airport layout plan developed by DeKalb County and approved by the Federal Aviation Administration which graphically illustrates the development and proposed development of the airport facilities and the use of the land included within the airport boundaries. Such use does not include a sanitary landfill or any other dumping ground for garbage.

17.

The UNITED STATES OF AMERICA, through the Federal Aviation Administration, recognized that the existence of a sanitary landfill on which garbage was dumped constituted an attraction of birds of various species, and that birds [16] constitute a definite hazard for aircraft taking off and landing.

18.

From March 9, 1970, through February 14, 1972, the Federal Aviation Administration communicated with officials of DeKalb County, both by letter and by conference, relative to alleviation of the bird hazard caused by the existence of the sanitary landfill and the dumping of garbage thereon. Subsequent to said date of February 14, 1972, and for more than one (1) year prior to the date of said fatal crash on February 26, 1973, no further communications, either by letter or by conference, were had by the Federal Aviation Administration with officials of DeKalb County directed toward the alleviation of such bird hazard.

19.

Said letters and conferences were of no avail, and both

the UNITED STATES OF AMERICA and DEKALB COUNTY failed to mitigate the hazard.

20.

On the 27th day of June, 1967, the Federal Aviation Administration and the UNITED STATES OF AMERICA entered into one of a series of similar agreements with DEKALB COUNTY, by and through the Chairman of the BOARD OF COMMISSIONERS OF ROADS AND REVENUES. A copy of said Agreement of June 27, 1967, is attached hereto, marked Exhibit "A," and made a part hereof by reference.

21.

Said Agreement, in Paragraph 12 of the Project Application, provided as follows:
[17]

> "The Sponsor will keep up to date at all times an airport layout plan . . . Such airport layout plan, and each amendment, revision, or modification thereof, shall be subject to the approval of the FAA, which approval shall be evidenced by the signature of a duly authorized representative of the FAA on the face of the airport layout plan. The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the FAA, if such changes or alterations might adversely affect the safety, utility, or efficiency of the Airport."

22.

The UNITED STATES OF AMERICA and the Federal Aviation Administration allowed changes in the airport layout, contrary to the official layout plan, when

they knew of the existence of said sanitary landfill or garbage dump, and when the UNITED STATES OF AMERICA had the power and jurisdiction to have mitigated said Airport hazard.

23.

With further reference to said Agreement marked Exhibit "A," as a part of the consideration for the sums paid by the UNITED STATES OF AMERICA to DEKALB COUNTY, said DEKALB COUNTY, as Sponsor, agreed as follows:

> ". . . These covenants shall remain in full force and effect throughout the useful life of the facilities developed under this Project, . . ." (Project Appligation, Sponsor's Assurances, Paragraph 1).

[18] and

> "The Sponsor will operate the Airport as such for the use and benefit of the public. . . . That the Sponsor may prohibit or limit any given type, kind or class of aeronautical use of the Airport if such action is necessary for the safe operation of the Airport or necessary to serve the civil aviation needs of the public." (Project Application, Sponsor's Assurances, Paragraph 2).

and

> "The Sponsor will operate and maintain in a safe and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes." (Project Application, Sponsor's Assurances, Paragraph 6).

and

> "In addition, the Sponsor will not erect or permit the erection of any permanent structure or facility which would interfere materially with the use, operation, or future development of the Airport, in any portion of a runway approach area in which the Sponsor has acquired, or may hereafter acquire, property interests permitting it to so control the use made of the surface of the land." (Project Application, Sponsor's Assurances, Paragraph 7).

[19] and

> ". . . The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the FAA, if such changes or alterations might adversely affect the safety, utility, or efficiency of the Airport." (Project Application, Sponsor's Assurances, Paragraph 12).

and

> "Insofar as is within its power and to the extent reasonable, the Sponsor will take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft." (Project Application, Sponsor's Assurances, Paragraph 13).

24.

The Defendant, DEKALB COUNTY, violated the provisions of said contract by willfully permitting the existence of a garbage dump and bird hazard on the Airport site. Said contract having been made for the benefit of the public, RICHARDSON F. MIREE and LUCY ESTES MIREE, deceased, and Plaintiffs herein were third party

beneficiaries of said contract and any other contracts and agreements similarly made between DEKALB COUNTY, represented by the County Commissioners, and the UNITED STATES OF AMERICA. The Defendant [20] DEKALB COUNTY is liable for breach of said contract and any other similar contract, and is liable for the wrongful deaths of RICHARDSON F. MIREE and LUCY ESTES MIREE resulting from negligence and recklessness growing out of the breach of said contract.

25.

On February 26, 1973, at approximately 10:10 A. M., E.S.T., air traffic control personnel of the Federal Aviation Administration of the Department of Transportation of the United States who were operating the control tower gave clearance to the Learjet airplane designated "N454RN" for takeoff from runway 20L at the DeKalb-Peachtree Airport. Prior to takeoff and at the time of takeoff there were thousands of birds in the vicinity of the Airport and in the vicinity of runway 20L. The existence of the birds was known to both the employees of DEKALB COUNTY who were operating the airport and to the Federal traffic air control personnel operating the airport control tower. Immediately after takeoff, the engines of Learjet "N454RN" ingested birds into both engines. The ingestion of the birds into both engines was the cause of the crash of said Learjet airplane which resulted in the deaths of RICHARDSON F. MIREE and LUCY ESTES MIREE.

26.

The pilot of the Learjet airplane, "N454RN", Ernest L. Sellfors, and the co-pilot, David E. Phillips, were the

agents, servants and employees of Defendants SOUTHEAST MACHINERY, INC. and MACHINERY BUYERS CORP. Said pilot and co-pilot were experienced and knew, or should have known, [21] that the existence of thousands of birds constituted a deadly hazard to a jet aircraft. Said pilot and co-pilot knew, or should have known, on the day in question prior to the takeoff of said Learjet airplane that there were thousands of birds in the vicinity of said Airport and particularly runway 20L. Said pilot and co-pilot should not have begun a takeoff of said Learjet airplane under the conditions existing at approximately 10:10 A.M., E.S.T., on February 26, 1973.

27.

By reason of the existence of said garbage dump prior to and on February 26, 1973, the operation of DeKalb-Peachtree Airport by DEKALB COUNTY and the UNITED STATES OF AMERICA constituted a public nuisance and a hazard to public safety.

28.

The maintenance of said garbage dump at said DeKalb-Peachtree Airport constituted an airport hazard as defined in 49 U.S.C. 1101, 49 U.S.C. 1711, and was a violation of 49 U.S.C. 1110(3) and 49 U.S.C. 1718(3).

29.

The UNITED STATES OF AMERICA, by and through its agents and employees, was guilty of negligence which proximately contributed to the deaths of RICHARDSON F. MIREE and LUCY ESTES MIREE in the following particulars:

(a) In failing to require DEKALB COUNTY to remove and mitigate the Airport bird hazard by reason

of the dumping of garbage on DeKalb-Peachtree Airport, the same being negligence per se and negligence as a matter of fact;

[22]

(b) In allowing jet propelled aircraft to operate in and out of DeKalb-Peachtree Airport when birds were a known hazard by reason of the existence of the garbage dump;

(c) In clearing Learjet "N454RN" for takeoff on February 26, 1973, in spite of the known existence of thousands of birds which were located in the vicinity of runway 20L at DeKalb-Peachtree Airport;

(d) In failing to give reasonable and adequate notice to pilots and airport operations personnel of the danger of birds to aircraft at the DeKalb-Peachtree Airport;

(e) In allowing DEKALB COUNTY to accomplish a change in the Airport layout plan of DeKalb-Peachtree Airport by establishing a garbage dump thereon, the same being in violation of the airport layout plan which had been previously approved by the UNITED STATES OF AMERICA.

30.

Defendants DEKALB COUNTY and COUNTY COMMISSIONERS, their predecessors in office, and their agents, servants and employees, were guilty of breach of contract and negligence arising out of breach of contract with the UNITED STATES OF AMERICA, all of which contributed proximately to the deaths of RICHARDSON F. MIREE and LUCY ESTES MIREE in the following particulars:

(a) By permitting changes in the DeKalb-Peachtree Airport and its facilities, other than in conformity with the airport layout plan as officially approved by the UNITED STATES OF AMERICA, where such changes adversely affected the safety of the Airport;

(b) In operating the DeKalb-Peachtree Airport for the benefit of the public, and in connection therewith failing to prohibit the use of jet propelled aircraft where a [23] portion of the airport was utilized as a garbage dump attracting large flocks of birds;

(c) In permitting activity at the Airport and facilities thereon which interfered with its use for airport purposes;

(d) In failing to restrict the use of land adjacent to runway 20L of the Airport to purposes compatible with normal operation of the Airport;

(e) In failing to abide by the specific warnings of the UNITED STATES OF AMERICA with respect to the hazard created by the garbage dump and the requests made to remove said dump;

(f) In dumping and depositing untreated garbage, trash, refuse, offal, filth and other waste materials on DeKalb-Peachtree Airport property;

(g) In failing to specifically warn airport personnel and jet aircraft owners and pilots of the danger created by flocks of birds located in and about the vicinity of the Airport;

(h) In recklessly and wantonly continuing to use Airport property for a garbage dump after receiving notice of the bird hazard.

31.

Defendants MACHINERY BUYERS CORP. and SOUTHEAST MACHINERY, INC. were guilty of gross negligence which proximately contributed to the deaths of RICHARDSON F. MIREE and LUCY ESTES MIREE in the following particulars:

(a) In taking off from DeKalb-Peachtree Airport

[23]

when thousands of birds were located in and about runway 20L;

(b) In failing to inquire of airport control personnel respecting the safety of a takeoff of a jet airplane on February 26, 1973, as such takeoff might relate to the [24] existence of birds in and about the Airport;

(c) In utilizing a jet aircraft for the carriage of passengers from DeKalb-Peachtree Airport when it was known, or should have been known, that a garbage dump existed which attracted large flocks of birds to the area.

32.

At the time of his death, RICHARDSON F. MIREE was 36 years of age and had a life-expectancy of 35.78 years in accordance with the Commissioners 1958 Standard Ordinary Mortality Table, and a life-expectancy of 38.90 years in accordance with the Annuity Mortality Table 1949, Ultimate. He was earning at the time of his death in excess of $130,000.00 per year. Plaintiffs herein show that the full value of the deceased, RICHARDSON F. MIREE, was FOUR MILLION, FIVE HUNDRED THOUSAND ($4,500,000.00) DOLLARS.

33.

At the time of her death, LUCY ESTES MIREE was 32 years of age and had a life-expectancy of 39.43 years in accordance with the Commissioners 1958 Standard Ordinary Mortality Table, and a life-expectancy of 47.77 years in accordance with the Annuity Mortality Table 1949, Ultimate. She was a faithful and dutiful housewife and mother. Plaintiffs herein sue for the full value of her life in the amount of ONE MILLION ($1,000,000.00) DOLLARS.

[25]

WHEREFORE, Plaintiff pray:

(a) That all of said Defendants be required to appear and answer this Complaint within the time allowed by law; and

(b) That Plaintiffs have judgment against the [25] Defendants in the total amount of FIVE MILLION, FIVE HUNDRED THOUSAND ($5,500,000.00) DOLLARS, with costs of this action.

HANSELL, POST, BRANDON & DORSEY

By: /s/ HUGH M. DORSEY, JR.
HUGH M. DORSEY, JR.

/s/ JULE W. FELTON, JR.
JULE W. FELTON, JR.

3300 First National Bank Tower
Atlanta, Georgia 30303
658-9600

JOHNSTON, BARTON, PROCTOR, SWEDLAW & NAFF

By: /s/ GILBERT E. JOHNSTON
GILBERT E. JOHNSTON

Attorneys for Plaintiffs

Twelfth Floor
Bank for Savings Building
Birmingham, Alabama 35203
205/322-0616

[26]

FEDERAL AVIATION AGENCY

GRANT AGREEMENT

Part 1-Offer

Date of Offer JUL 21 1967

Airport DeKalb-Peachtree Atlanta, Georgia

Project No. 9-09-050-0705

Contract No. FA-67-SO-1464

TO: The County of DeKalb, Georgia
(herein referred to as the "Sponsor")

FROM: The United States of America (acting through the Federal Aviation Agency, herein referred to as the "FAA")

WHEREAS, the Sponsor has submitted to the FAA a Project Application dated May 30, 1967, for a grant of Federal funds for a project for development of the DeKalb-Peachtree Airport (herein called the "Airport"), together with plans and specifications for such project, which Project Application, as approved by the FAA is hereby incorporated herein and made a part hereof; and

WHEREAS, the FAA has approved a project for development of the Airport (herein called the "Project") consisting of the following-described airport development:

Acquire land for RPZ clear zone and approach to runway 28-20L (reimbursement for Parcel 51, including building relocation or removal and gas line relocation plus satisfactory property interests in Area C and related transitional areas); rehabilitate high intensity lighting, runway 9-27 (50% basis); install medium intensity lighting system, runway 16-34; clear approaches to runway 28-20L.

all as more particularly described in the property map and plans and specifications incorporated in the said Project Application;

EXHIBIT "A"

BEST COPY AVAILABLE

[27]

NOW THEREFORE, pursuant to and for the purpose of carrying out the provisions of the Federal Airport Act, as amended (49 U.S.C. 1101), and in consideration of (a) the Sponsor's adoption and satisfaction of the representations and assurances contained in said Project Application, and its acceptance of this Offer as hereinafter provided, and (b) the benefits to accrue to the United States and the public from the accomplishment of the Project and the operation and maintenance of the Airport as herein provided, THE FEDERAL AVIATION AGENCY, FOR AND ON BEHALF OF THE UNITED STATES, HEREBY OFFERS AND AGREES to pay, as the United States share of the allowable costs incurred in accomplishing the Project, 50 percent of all allowable project costs.

This Offer is made on and subject to the following terms and conditions:

1. The maximum obligation of the United States payable under this Offer shall be $ 200,366.

2. The Sponsor shall:

   (a) begin accomplishment of the Project within sixty (60) days after acceptance of this Offer or such longer time as may be prescribed by the FAA, with failure to do so constituting just cause for termination of the obligations of the United States hereunder by the FAA;

   (b) carry out and complete the Project without undue delay and in accordance with the terms hereof, the Federal Airport Act, and Sections 151.45-151.55 of the Regulations of the Federal Aviation Agency (14 CFR 151) in effect as of the date of acceptance of this Offer, which Regulations are hereinafter referred to as the "Regulations";

   (c) carry out and complete the Project in accordance with the plans and specifications and property map, incorporated herein, as they may be revised or modified with the approval of the FAA.

3. The allowable costs of the project shall not include any costs determined by the FAA to be ineligible for consideration as to allowability under Section 151.41 (b) of the Regulations.

4. Payment of the United States share of the allowable project costs will be made pursuant to and in accordance with the provisions of Sections 151.57-151.63 of the Regulations. Final determination as to the allowability of the costs of the project will be made at the time of the final grant payment pursuant to Section 151.63 of the Regulations. Provided, that, in the event a semi-final grant payment is made pursuant to Section 151.63 of the Regulations, final determination as to the allowability of those costs to which such semi-final payment relates will be made at the time of such semi-final payment.

5. The Sponsor shall operate and maintain the Airport as Provided in the Project Application incorporated herein and specifically covenants and agrees, in accordance with its Assurance 1 in Part III of said Project Application, that in its operation and the operation of all facilities thereof, neither it nor any person or organization occupying space or facilities thereon will discriminate against any person or class of persons by reason of race, color, creed or national origin in the use of any of the facilities provided for the public on the airport.

6. The FAA reserves the right to amend or withdraw this Offer at any time prior to its acceptance by the Sponsor.

7. This Offer shall expire and the United States shall not be obligated to pay any part of the costs of the Project unless this Offer has been accepted by the Sponsor on or before June 29, 1967 or such subsequent date as may be prescribed in writing by the FAA.

8. In addition the sponsor shall:

(a) Incorporate or cause to be incorporated in each contract for construction work under the project, or any modification thereof, the equal opportunity clause as set forth in Section 202 of Executive Order No. 11246 of September 24, 1965, or such modification thereof as may be approved by the Secretary of Labor.

(b) Incorporate or cause to be incorporated in each bid or proposal form submitted by prospective contractors for construction work under the project the provisions prescribed by Section 151.54(d) (1), Part 151, Federal Aviation Regulations.

(c) Be bound by said equal opportunity clause in any construction work under the project which it performs itself other than through its own permanent work force directly employed or through the permanent work force directly employed by another agency of government.

(d) Cooperate actively with the FAA and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor.

(e) Furnish the FAA and the Secretary of Labor such information as they may require for the supervision of such compliance and will otherwise assist the FAA in the discharge of its primary responsibility for securing compliance.

(f) Refrain from entering into any contract or contract modification subject to Executive Order No. 11246 with a contractor debarred from, or who has not demonstrated eligibility for, government

contracts and Federally assisted construction contracts pursuant to Part II, Subpart B of Executive Order No. 11246.

(g) Carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the FAA or the Secretary of Labor pursuant to Part II, Subpart D of Executive Order No. 11246; and in the event that the sponsor fails or refuses to comply with its undertakings, the FAA may cancel, terminate or suspend in whole or in part any contractual arrangement it may have with the sponsor, may refrain from extending any further assistance under any of its programs subject to Executive Order 11246 until satisfactory assurance of future compliance has been received from such applicant, or may refer the case to the Department of Justice for appropriate legal proceedings.

9. The sponsor's financial records of the project, established, maintained and made available to personnel of the FAA in conformity to Section 151.55 of the Regulations of the Federal Aviation Agency (14 CFR 151) will also be available to representatives of the Comptroller General of the United States.

10. It is understood and agreed that the terms "Administrator of the Federal Aviation Agency," "Administrator" or "Federal Aviation Agency" wherever they appear in this Agreement, in the Project Application, plans and specifications or other documents constituting a part of this Agreement shall be deemed to mean the Federal Aviation Administrator or the Federal Aviation Administration as the case may be.

11. Notwithstanding the provision of Paragraph 3, Part III, of the Project Application, the sponsor covenants and agrees that it will not grant or permit any exclusive right forbidden by Section 308(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1349) at the airport, or at any other airport now or hereafter owned or controlled by it. In furtherance of the policy of the FAA under this covenant, the sponsor agrees that, unless authorized by the Administrator, it will not, either directly or indirectly, grant or permit any person, firm, or corporation the exclusive right at the airport or at any other airport now or hereafter owned or controlled by it, to conduct any aeronautical activities, including, but not limited to, charter flights, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other aeronautical activity, repair and maintenance of aircraft, sale of aircraft parts, and any other activities which because of their relationship to the operation of aircraft can be regarded as an aeronautical activity. The sponsor further agrees that it will terminate any such exclusive right (including any exclusive right to engage in the sale of gasoline or oil, or both) now existing at the airport, or at any other airport now or hereafter owned or controlled by it, at the earliest renewal, cancellation, or expiration date applicable to the agreement that established the exclusive right, and certifies that there is no exclusive right not subject to termination under this provision."

12. The Federal Government does not now plan or contemplate the construction of any structures pursuant to Paragraph 9 of Part IVI - Sponsor's Assurances of the project application dated May 30, 1967, and, therefore it is understood and agreed that the Sponsor is under no obligation to furnish any areas or rights without cost to the Federal Government under this Grant Agreement. However, nothing contained herein shall be construed as altering or changing the rights of the United States and/or the obligations of the Sponsor under prior Grant Agreements to furnish rent-free space for the activities specified in such agreements.

The Sponsor's acceptance of this Offer and ratification and adoption of the Project Application incorporated herein shall be evidenced by execution of this instrument by the Sponsor, as hereinafter provided, and said Offer and Acceptance shall comprise a Grant Agreement, as provided by the Federal Airport Act, constituting the obligations and rights of the United States and the Sponsor with respect to the accomplishment of the Project and the operation and maintenance of the Airport. Such Grant Agreement shall become effective upon the Sponsor's acceptance of this Offer and shall remain in full force and effect throughout the useful life of the facilities developed under the Project but in any event not to exceed twenty years from the date of said acceptance.

UNITED STATES OF AMERICA
FEDERAL AVIATION AGENCY
ADMINISTRATOR

By [signature] .....
(TITLE)
Area Manager, Atlanta

Part II-Acceptance

The County of DeKalb County, Georgia does hereby ratify and adopt all statements, representations, warranties, covenants, and agreements contained in the Project Application and incorporated materials referred to in the foregoing Offer and does hereby accept said Offer and by such acceptance agrees to all of the terms and conditions thereof.

Executed this 27th day of August, 19 67

County of DeKalb, Georgia
(Name of Sponsor)

By [signature]
Bruce H. Manning, Jr.
Title Chairman, Board of Commissioners of Roads and Revenues

(SEAL)

Attest: [signature]
James E. Carroll
Title: Clerk, Board of Commissioners

CERTIFICATE OF SPONSOR'S ATTORNEY

I, [signature], acting as Attorney for County of DeKalb, Georgia (herein referred to as the "Sponsor") do hereby certify:

That I have examined the foregoing Grant Agreement and the proceedings taken by said Sponsor relating thereto, and find that the Acceptance thereof by said Sponsor has been duly authorized and that the execution thereof is in all respects due and proper and in accordance with the laws of the State of Georgia, and further that, in my opinion, said Grant Agreement constitutes a legal and binding obligation of the Sponsor in accordance with the terms thereof.

Dated at Decatur, Georgia this 27th day of August, 1967

[signature]
Title County Attorney

FAA FORM 1632-13 (6-63) USE PREVIOUS EDITION

...m Approved.
Budget Bureau No. 61-R0134.

UNITED STATES OF AMERICA
FEDERAL AVIATION AGENCY

PROJECT APPLICATION

(For Federal Aid for Development of Public Airports)

Part I—PROJECT INFORMATION

The DeKalb County (herein called the "Sponsor") hereby makes application to the Federal Aviation Agency (hereinafter called the "FAA"), for a grant of Federal funds pursuant to the Federal Airport Act and the Regulations issued thereunder, for the purpose of aiding in financing a project (herein called the "Project") for development of the DeKalb Peachtree Airport (herein called the "Airport") located in DeKalb County State of Georgia.

It is proposed that the Project consist of the following-described airport development:

Acquire land for approaches to runway 2R-20L including reimbursement for tract 51; rehabilitate high intensity runway lighting, runway 9-27; install medium intensity lighting system, runway 16-34; clear approaches to runway 2R-20L.

all as more particularly described on the property map attached (hereto as Exhibit "A")* (as Exhibit "A" to Project Application dated _____ for Project No. _____), and in the plans and specifications submitted to the FAA on May 5, 1967 and approved May 9, 1967 which are made a part hereof.

*Strike out the inappropriate clause.

THE FOLLOWING IS A SUMMARY OF THE ESTIMATED COSTS OF THE PROJECT:

ITEM	TOTAL ESTIMATED COST	ESTIMATED SPONSOR'S SHARE OF COST		ESTIMATED FEDERAL SHARE OF COST	
		AMOUNT	PER CENT	AMOUNT	PER CENT
1. Land Costs	361,732	180,866	50	180,866	50
*2. Construction Costs	24,000				
*3. Engineering and Supervision Costs	3,000				
4. Administrative Costs	1,000				
*5. Total of 2, 3, and 4 above	28,000	14,000	50	14,000	50
6. Contingencies	11,000	5,500	50	5,500	50
7. Total All Estimated Project Costs (Items 1, 5, and 6)	400,732	200,366		200,366	

*These items will vary for County and FAA share of costs when 25%/75% for H.I. Runway lighting system costs are determined.

Part II—REPRESENTATIONS

The Sponsor hereby represents and certifies as follows:

1. **Legal Authority.**—The Sponsor has the legal power and authority: (1) to do all things necessary in order to undertake and carry out the Project in conformity with the Act and the Regulations, (2) to accept, receive, and disburse grants of funds from the United States in aid of the Project, on the terms and conditions stated in the Act and the Regulations; and (3) to carry out all of the provisions of Parts III and IV of this Project Application.

2. **Funds.**—The Sponsor now has on deposit, or is in a position to secure, $ 200,366 for use in defraying the costs of the Project. The present status of these funds is as follows:

Airport construction and improvement fund

3. **Compatible Land Use.**—The Sponsor has taken the following actions to assure compatible usage of land adjacent to or in the vicinity of the airport:

Airport zoning has been passed and approved by the Federal Aviation Agency.

Adequate property interests are being acquired in clear zones.

4. Approvals of Other Agencies.—The Project has been approved by all non-Federal agencies whose approval is required, namely:

NONE REQUIRED

5. Defaults.—The Sponsor is not in default on any obligation to the United States or any agency of the United States Government relative to the development, operation, or maintenance of any airport, except as stated herewith:

NONE

6. Possible Disabilities.—There are no facts or circumstances (including the existence of effective or proposed leases, use agreements, or other legal instruments affecting use of the Airport or the existence of pending litigation or other legal proceedings) which in reasonable probability might make it impossible for the Sponsor to carry out and complete the Project or carry out the provisions of Parts III and IV of the Project Application, either by limiting its legal or financial ability or otherwise, except as follows:

NONE

7. Land.—(a) The Sponsor holds the following property interest in the following areas of land[1] which are to be developed or used as part of or in connection with the Airport, subject to the following exceptions, encumbrances, and adverse interests, all of which areas are identified on the aforementioned property map designated as Exhibit "A":

There has been no change in property interests in tracts No's. 1,2 and "A" since submittal of report of Lawyers Title Insurance Co. dated March 14, 1962 and Title Examination by Robert E. Mosley dated June 5, 1963, for Project No. 9-09-050-D402. Fee Simple title to tract 51, subject to terms and conditions contained in Quit-claim Deed dated Oct. 14, 1965 from General Services Admin. to DeKalb Co. Fee Simple Title to tracts B-1,C,D,E,F,G,H,I,O,Q,J,U,32,34,34A and 35 was acquired under -02,03,and 04 projects.

The Sponsor further certifies that the above is based on a title examination by a qualified attorney or title company and that such attorney or title company has determined that the Sponsor holds the above property interests.

[1] State character of property interest in each area and list and identify for each all exceptions, encumbrances, and adverse interests, such as liens, taxes and assessments, outstanding leases, easements, mineral rights, etc. The separate tracts of land need only be identified here by the area numbers shown on the property map.

(b) The Sponsor will acquire within a reasonable time, but in any event prior to the start of any construction work under the Project, the following property interest in the following areas of land[1] on which such construction work is to be performed, all of which areas are identified on the aforementioned property map designated as Exhibit "A":

NONE REQUIRED

(c) The Sponsor will acquire within a reasonable time, and if feasible prior to the completion of all construction work under the Project, the following property interest in the following areas of land[1] which are to be developed or used as part of or in connection with the Airport as it will be upon completion of the Project, all of which areas are identified on the aforementioned property map designated as Exhibit "A":

Satisfactory property interests in Area C and related transitional areas.

[1] State character of property interest in each area and list and identify for each all exceptions, encumbrances, and adverse interests, such as liens, taxes and assessments, outstanding leases, easements, mineral rights, etc. The separate tracts of land need only be identified here by the area numbers shown on the property map.

Part IV. SPONSOR'S ASSURANCES

In order to furnish the assurances required by the Act and Regulations the Sponsor hereby covenants and agrees with the United States, as follows:

1. These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal aid for the Project or any portion thereof, made by the FAA and shall remain a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed, herein, the Project, but in any event not to exceed twenty (20) years from the date of said acceptance of an offer of Federal aid for the Project.

2. The Sponsor will operate the Airport as such for the use and benefit of the public. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will keep the Airport open to all types, kinds, and classes of aeronautical use without discrimination between such types, kinds, and classes: *Provided*, That the Sponsor may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the Airport as may be necessary for the safe and efficient operation of the Airport; *And Provided Further*, That the Sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the Airport if such action is necessary for the safe operation of the Airport or necessary to serve the civil aviation needs of the public.

3. The Sponsor will not grant or permit any exclusive right for the use of the Airport forbidden by Section 308 of the Federal Aviation Act of 1958, and will otherwise comply with all applicable laws. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that, unless authorized by the Administrator, it will not, either directly or indirectly, grant or permit any person, firm, or corporation the exclusive right for the conduct of any aeronautical activities on the Airport, including but not limited to, charter flights, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other aeronautical activity, repair and maintenance of aircraft, sale of aircraft parts, and any other activities which because of their direct relationship to the operation of aircraft can be regarded as an aeronautical activity: *Provided*, That the prohibition against the grant or permit of an exclusive right as set forth herein in no way alters the rights or obligations of the Sponsor under a surplus property instrument of transfer pursuant to which surplus property was conveyed to the Sponsor by the United States pursuant to the *Surplus Property Act of 1944, (61 Stat. 678), as amended.*

4. The Sponsor agrees that it will operate the Airport for the use and benefit of the public, on fair and reasonable terms, and without unjust discrimination. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically covenants and agrees:

a. That in its operation and the operation of all facilities on the airport, neither it nor any person or organization occupying space or facilities thereon will discriminate against any person or class of persons by reason of race, color, creed, or national origin in the use of any of the facilities provided for the public on the Airport.

b. That in any agreement, contract, lease, or other arrangement under which a right or privilege at the Airport is granted to any person, firm, or corporation to conduct or to the public any service (including the furnishing of sales any accommodations, products, materials, or supplies) on the operation of aircraft at the Airport, the Sponsor will insert and enforce provisions requiring the contractor:

(1) to furnish said service on a fair, equal, and not unjustly discriminatory basis to all users thereof, and

(2) to charge fair, reasonable, and not unjustly discriminatory prices for each unit or service; *Provided*, That the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

c. That it will not exercise or grant any right or privilege which would operate to prevent any person, firm, or corporation operating aircraft on the Airport from performing any services on its own aircraft with its own employees (including, but not limited to maintenance and repair) that it may choose to perform.

d. In the event the Sponsor itself exercises any of the rights and privileges referred to in subsection b, the services involved will be provided on the same conditions as would apply to the furnishing of such services by contractors under the provisions of subsection b above and prices of such subsection b.

5. Nothing contained herein shall be construed to prohibit the granting or exercise of an exclusive right for the furnishing of nonaviation products and supplies or any service of a nonaeronautical nature or to obligate the Sponsor to furnish any particular nonaeronautical service at the Airport.

6. The Sponsor will operate and maintain in a safe and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes: *Provided*, That nothing contained herein shall be construed to require that the Airport be operated for aeronautical uses during temporary periods when snow, flood or other climatic conditions interfere with such operation and maintenance; *And Provided Further*, That nothing herein shall be construed as requiring the maintenance, repair, restoration or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the Sponsor.

7. Insofar as it is within the power and reasonably possible, the Sponsor will take steps to enact and enforce such zoning ordinances and to take such other action as may be necessary or suitable to restrict the use of property in the vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft, and to prevent the erection or creation of future airport hazards or obstructions in the approach areas of the Airport which would constitute an obstruction to air navigation according to the criteria or standards prescribed in the most current edition of Advisory Circular (AC) No. 150/5300-13, or Advisory Circular (AC) No. 150/5300-1, which have been developed pursuant to the current approved airport layout plan. In addition, the Sponsor will not erect or permit the erection of any permanent structure or facility which would interfere materially with the use, operation, or future development of the Airport, in any portion of a runway approach area to which the Sponsor has acquired, or may hereafter acquire, property interests permitting it to so control the use and/or development of the land.

8. All facilities of the Airport developed with Federal aid and all those available for the landing and taking off of aircraft will be available to the United States at all times, without charge, for use by military and naval aircraft in common with other aircraft, except that if the use by military and naval aircraft is substantial, a reasonable share, proportionate to such use, of the cost of operating and maintaining facilities so used, may be charged. Unless otherwise determined by the FAA, or otherwise agreed to by the Sponsor and the using agency, substantial use of an airport by military and naval aircraft will be considered to exist when operations of such aircraft are in excess of those which, in the opinion of the FAA, would unduly interfere with use of the landing area by other authorized aircraft, or during any calendar month that:

a. Five (5) or more military or naval aircraft are regularly based at the airport or on land adjacent thereto; or

b. The total number of movements (counting each landing as a movement and each takeoff as a movement) of military or naval aircraft is 500 or more, or the gross cumulative weight of military or naval aircraft using the Airport (the total movements of military or naval aircraft multiplied by gross certified weights of such aircraft) is in excess of five million pounds.

9. Whenever so requested by the FAA, the Sponsor will furnish without cost to the Federal Government, for construction, operation and maintenance of facilities for air traffic control activities, or weather reporting activities and communication activities related to air traffic control, such areas of land or water, or estate therein, or rights in buildings of the Sponsor as the FAA may consider necessary or desirable for construction of Federal airport or space or facilities for such purposes. The appropriate amounts of areas and the nature of the property interests and/or rights so required will be set forth in the Grant Agreement relating to the Project. Such areas or any portion thereof will be made available or provided herein within 4 months after receipt of written request from the FAA.

10. The Sponsor will furnish the FAA with such annual or special airport financial and operational reports as may be reasonably requested. Such reports may be submitted on forms furnished by the FAA, or may be submitted in such manner as the Sponsor elects so long as the essential facts are adequately disclosed. The Airport accounting system shall be maintained in such a manner as to clearly reflect the financial operations of the Airport. The Sponsor will furnish to the FAA, upon request, a true copy of any such document.

11. The Sponsor will not enter into any transaction which would operate to deprive any or all of the covenants made herein, unless by such transaction the obligation to perform all such covenants is assumed by the new or amended entity that may have the power, authority and financial resources to carry out all such covenants. If any such transaction is made for maintenance or operation of the Airport by any agency or person other than the Sponsor, or any change of the Sponsor, the Sponsor will require sufficient legal authority to insure that the Airport will be operated and maintained in accordance with the Act, the Regulations, and these covenants.

12. The Sponsor will keep up to date at all times an airport layout plan of the Airport showing: (1) the boundaries of the Airport and all proposed additions thereto, together with the boundaries of all offsite areas owned or controlled by the Sponsor for airport purposes and proposed additions thereto; (2) the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars, and roads), showing all proposed extensions and reductions of existing airport facilities; and (3) the location of all existing and proposed nonaviation areas and of all existing improvements thereon. Such airport layout plan, and each amendment, revision, or modification thereof, shall be subject to the approval of the FAA which approval shall be evidenced by the signature of a duly authorized representative of the FAA on or attached to the airport layout plan. The Sponsor will not make or permit any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the FAA, if such changes or alterations might adversely affect the safety, utility, or efficiency of the Airport.

13. Insofar as it is within its power and to the extent reasonable, the Sponsor will take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.

14. If at any time it is determined by the FAA that there is any outstanding right or claim of right in or to the Airport property, other than those set forth in Part II, paragraphs 7(a), 7(b), and 7(c), the existence of which creates an unacceptable risk of interference with the operation of the Airport or the performance of the covenants of this Part, the Sponsor will acquire, extinguish, or modify such right or claim of right in a manner acceptable to the FAA.

15. Unless the context otherwise requires, all terms used in these covenants which are defined in the Act and the Regulations shall have the meanings assigned to them there in.

16. Exhibit "B", Sponsor's Assurances of Nondiscrimination, is attached hereto and made a part hereof.

*Section 77.23 as applied to Section 77.27 Part 77 of the Federal Aviation Regulations.

Part IV- PROJECT AGREEMENT

If the Project or any portion thereof is approved by the FAA, and an offer of Federal aid for such approved Project is accepted by the Sponsor, it is understood and agreed that all airport development included in such Project will be accomplished in accordance with the Act and the Regulations, the plans and specifications for such development, as approved by the FAA, and the Grant Agreement with respect to the Project.

IN WITNESS WHEREOF, the Sponsor has caused this Project Application to be duly executed in its name, this 30th day of May, 19 67

DeKalb County, Georgia
(Name of Sponsor)

By Prince H. Manning, Jr.
Prince H. Manning, Jr.

Chairman, Board of Commissioners of Roads and Revenues
(Title)

OPINION OF SPONSOR'S ATTORNEY

I HEREBY CERTIFY that all statements of law made in this Project Application and all legal conclusions upon which the representations and covenants contained herein are based, are in my opinion true and correct.

George P. Dillard
George P. Dillard

DeKalb County Attorney
(Title)

30 May 1967
(Date)

SPONSOR AGREEMENT TO ACCOMPANY FEDERAL AVIATION ADMINISTRATION FORM 5102-1 FOR A GRANT OF FUNDS FOR THE DEVELOPMENT OF IMPROVEMENT OF THE DeKalb Peachtree AIRPORT

Non-Discrimination in Federally-Assisted Programs of the FAA. In order to further the assurance required by Title VI of the Civil Rights Act of 1964, and by Part 15 of the Federal Aviation Regulations, as amended, the DeKalb County, Georgia (hereinafter called the "Sponsor") hereby covenants and agrees with the United States (hereinafter called the "Government") as follows:

The Sponsor in the operation and use of the DeKalb Peachtree Airport, will not on the grounds of race, color, or national origin discriminate or permit discrimination against any person or group of persons in any manner prohibited by Part 15 of the Federal Aviation Regulations.

The Sponsor will include, or require the inclusion of, the foregoing covenant in every agreement or concession pursuant to which any person or persons, other than the Sponsor, operates or has the right to operate any facility on the Airport providing services to the public, and a provision granting the Sponsor the right to take such action as the Government may direct to enforce such covenant.

Noncompliance with the above assurances shall constitute a material breach, and in the event of such noncompliance the Government may take appropriate action to enforce compliance, may terminate the Grant Agreement to which this covenant relates, or seek judicial enforcement.

This covenant shall become effective upon execution of a Grant Agreement pursuant to the above identified project application and shall constitute part of the Grant Agreement to which it relates and shall remain in full force and effect so long as the airport covered by such agreement continues to be used and operated as a public airport.

DeKalb County Georgia
(Name of Sponsor)

By Prince H. Manning, Jr.

Title Chairman, Board of Commissioners of Roads and Revenues

30 May 1967
(Date)

(Name of Sponsor)

By

Title

(Date)

SO FORM 5102-2 (4-66)

[147]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

[Filed in Clerk's Office Jan. 4, 1974,
Ben H. Carter, Clerk; By: P.J.E., Deputy Clerk.]

GEORGE HENSON MIREE, CLAUDE ESTES MIREE and DOROTHY ESTES MIREE, Minors, by and through AUBREY S. MIREE, JR. and CLAUDE H. ESTES, JR., Co-Guardians of said minors, *Plaintiffs,* vs. UNITED STATES OF AMERICA; MACHINERY BUYERS CORP.; SOUTHEAST MACHINERY, INC.; and DEKALB COUNTY, GEORGIA, *Defendants.*	CIVIL ACTION FILE NO. 19293

ANSWER OF DEFENDANT, DEKALB COUNTY, GEORGIA

Comes now DEKALB COUNTY, GEORGIA, and responds to the Complaint of Plaintiffs as follows:

RESPONSE AS TO ALLEGATIONS OF JURISDICTION

1.

DeKalb County, Georgia is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 2 and 3 of the

Complaint of Plaintiffs as relates to allegations of jurisdiction.

2.

DeKalb County, Georgia admits the allegations contained in paragraph 4 (b) of the Complaint of Plaintiffs as relates to allegations of jurisdiction. Responding further, DeKalb County, Georgia is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations contained in paragraph 4 of the Complaint of Plaintiffs.

[148] **RESPONSE TO CAUSE OF ACTION**

1.

DeKalb County, Georgia denies the allegations contained in paragraph 1 of the Complaint of Plaintiffs.

2.

This Defendant admits the allegations contained in paragraph 2 of the Complaint of Plaintiffs.

3.

This Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the Complaint of Plaintiffs.

4.

Responding to paragraph 4 of the Complaint of Plaintiffs, this Defendant admits DeKalb-Peachtree Airport is located within the boundaries of DeKalb County on land owned by the County and that said Airport has paved runways and airport hangers, servicing and parking facilities, a control tower with radio facilities, instrument

landing system control center and access to other radio and navigational aids. Responding further, DeKalb County, Georgia admits the airport is operated under the jurisdiction of the Federal Aviation Administration and avers that the airport is operated for the use and benefit of the public. Further responding, all other allegations contained in paragraph 4 of the Complaint of Plaintiffs are denied.

5.

This Defendant admits the allegations contained in paragraph 5 of the Complaint of Plaintiffs.

6.

Responding to paragraph 6 of the Complaint of Plaintiffs, this Defendant admits only that beginning in 1962, a portion of the land contiguous to the land utilized as an airport was used by DeKalb County as a landfill. [149] Further responding, the landfill was closed in 1964 and remained closed until March, 1966. Responding further, DeKalb County admits that since March, 1966 the land contiguous to that land utilized for airport facilities was utilized again for landfill purposes. Further responding, all other allegations contained in paragraph 6 of the Complaint of Plaintiffs are denied.

7.

Defendant denies the allegations contained in paragraphs 7, 8 and 9 of the Complaint of Plaintiffs.

8.

DeKalb County, Georgia denies those allegations of paragraph 10 of the Complaint directed to it.

9.

This Defendant admits the allegations contained in paragraph 11 of the Complaint of Plaintiffs.

10.

The allegation of paragraph 12 of the Complaint of Plaintiffs is directed to the United States of America and a response is not required of this Defendant.

11.

Responding to paragraph 13 of the Complaint of Plaintiffs, DeKalb County, Georgia admits that the United States of America by and through the Federal Aviation Administration had the responsibility for the administration of the Federal Airport Development Aid Program. Responding further, this Defendant avers that the various Federal Grant Agreements speak for themselves in respect of the provisions of such Federal Grant Agreements and the remainder of the allegations contained in paragraph 13 of the Complaint of Plaintiffs are denied.

[150] 12.

This Defendant is not required to respond to paragraph 14 of the Complaint of Plaintiffs as the allegations contained therein are directed to the United States of America.

13.

This Defendant admits the allegations contained in paragraph 15 of the Complaint of Plaintiffs.

14.

Responding to paragraph 16 of the Complaint of Plaintiffs, DeKalb County, Georgia admits the existence of an

airport layout plan and avers that such airport layout plan includes "industrial use". The remainder of the allegations contained in paragraph 16 of the Complaint of Plaintiffs are denied.

15.

The allegations contained in paragraph 17 of the Complaint of Plaintiffs are directed to the United States of America and an answer is not required of this Defendant.

16.

Responding to paragraph 18 of the Complaint of Plaintiffs, DeKalb County, Georgia admits that from March 9, 1970 through February 14, 1972, the Federal Aviation Administration and DeKalb County, Georgia communicated both by letter and by conference in respect to land usage of the land utilized as an airport facility and that land contiguous thereto in respect of the sanitary landfill. Responding further, the remainder of the allegations contained in paragraph 18 of the Complaint of Plaintiffs are denied.

17.

DeKalb County, Georgia denies the allegations contained in paragraph 19 of the Complaint of Plaintiffs.

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18.

DeKalb County, Georgia admits the allegations contained in paragraph 20 of the Complaint of Plaintiffs.

19.

Responding to paragraph 21 of the Complaint of Plaintiffs, DeKalb County, Georgia avers that paragraph 12 of the Project Application will speak for itself in respect

of its contents and no further answer is required of this Defendant.

20.

Responding to paragraph 22 of the Complaint of Plaintiffs, DeKalb County, Georgia avers that the United States of America and the Federal Aviation Administration has authority to allow changes in the airport layout plan and admits that the United States of America and the Federal Aviation Administration had knowledge of the existence of the sanitary landfill contiguous to the land utilized as an airport facility.

21.

Responding to paragraph 23 of the Complaint of Plaintiffs, DeKalb County, Georgia avers that the contents, provisions and agreements contained in Exhibit "A" of the Complaint of Plaintiffs are set out within said Exhibit and no further response to this paragraph is required by this Defendant.

22.

DeKalb County, Georgia denies the allegations contained in paragraph 24 of the Complaint of Plaintiffs.

23.

Responding to paragraph 25 of the Complaint of Plaintiffs, this Defendant admits the first sentence thereof wherein it is alleged the personnel of the Federal Aviation Administration gave clearance to the [152] Learjet airplane for takeoff from runway 20L at the DeKalb-Peachtree Airport. Responding further, DeKalb County is without knowledge or information sufficient to form a belief as to the truth of the allegation that the engines of the

Learjet aircraft ingested birds into both engines and that the ingestion of the birds caused the crash of said Learjet aircraft resulting in the deaths of Richardson F. Miree and Lucy Estes Miree. Responding further, this Defendant denies the remainder of the allegations contained in paragraph 25 of the Complaint of Plaintiffs.

24.

DeKalb County, Georgia is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the Complaint of Plaintiffs.

25.

DeKalb County, Georgia denies the allegations contained in paragraphs 27 and 28 of the Complaint of Plaintiffs.

26.

No response is required of DeKalb County, Georgia to the allegations contained in paragraph 29 of the Complaint of Plaintiffs as such allegations are directed to the United States of America.

27.

DeKalb County, Georgia denies the allegations contained in paragraph 30 of the Complaint of Plaintiffs and denies each and every sub-paragraph of paragraph 30 of the Complaint of Plaintiffs.

28.

DeKalb County, Georgia is not required to respond to paragraph 31 of the Complaint of Plaintiffs as such allegations are directed to Machinery Buyers Corp. and Southeast Machinery, Inc.

29.

Responding to paragraph 32 of the Complaint of Plaintiffs, DeKalb County, Georgia is without knowledge or information sufficient [153] to form a belief as to the truth of the allegations respecting the age, life expectancy and earnings of Richardson F. Miree. Responding further, DeKalb County, Georgia denies the remainder of the allegations contained in paragraph 32 of the Complaint of Plaintiffs and denies the allegation respecting the full value of the life of Richardson F. Miree.

30.

Responding to paragraph 33 of the Complaint of Plaintiffs, DeKalb County, Georgia is without knowledge or information sufficient to form a belief as to the truth of the age, and life expectancy of Lucy Estes Miree. Responding further, DeKalb County, Georgia denies the remainder of the allegations contained in paragraph 33 of the Complaint of Plaintiffs and denies the allegations in respect of the full value of the life of Lucy Estes Miree.

[153]

WHEREFORE, having fully answered, DeKalb County, Georgia demands trial by jury and prays it be hence discharged without liability.

JURY TRIAL DEMANDED ON ALL ISSUES

HARVEY, WILLARD & ELLIOTT

/s/ WENDELL WILLARD
WENDELL WILLARD

125 Trinity Place
Decatur, Georgia

LONG, WEINBERG, ANSLEY & WHEELER

/s/ MEADE BURNS
MEADE BURNS

/s/ EDWARD C. STONE
EDWARD C. STONE

3000 The Equitable Building
Atlanta, Georgia 30303
Phone: 525-5903

(Certificate of Service omitted in printing)

[156]

(Caption omitted in printing)

[155] Filed: Jan. 4, 1974

MOTION TO DISMISS

Comes now DEKALB COUNTY, GEORGIA, and pursuant to Fed. Rules Civ. Proc., Rule 12, 28 U.S.C.A. moves the Court that it be dismissed as a named party defendant in the above-styled action, showing the Court as follows:

1.

The Complaint of Plaintiffs fails to state a claim or cause of action against DeKalb County, Georgia upon which relief can be granted.

2.

Relief can be granted on none of Plaintiffs' claims against DeKalb County owing to the latter's governmental immunity.

3.

In particular, DeKalb County, Georgia, shows the Court that the Complaint of Plaintiffs fails to state a claim upon which relief can be granted in the following respects:

(a) In Georgia, no right of action will lie against a County for the creation and/or maintenance of a nuisance;

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(b) There is no right of action in plaintiffs, as third-party beneficiaries, on any alleged breach of any Federal Grant Agreements entered into by and between DeKalb County, Georgia and the Federal Aviation Administration because there is no intent made manifest within such Federal Grant Agreements to confer

upon third persons the type of benefit claimed by plaintiffs in this action;

(c) Even if the Federal Grant Agreements entered into by and between DeKalb County, Georgia and the Federal Aviation Administration were intended to benefit the public in the manner claimed by plaintiffs, the Complaint shows on its face that these Federal Grant Agreements have not been breached by DeKalb County in operating a sanitary landfill on property contiguous to DeKalb-Peachtree Airport in that the Federal Aviation Administration is alleged to have had knowledge of and thus to have consented to and consciously allowed the maintenance of said landfill;

(d) Even if plaintiffs otherwise had the right to sue as third-party beneficiaries for an alleged breach of the Federal Grant Agreements entered into by DeKalb County, Georgia and the Federal Aviation Administration, plaintiffs cannot recover damages for any alleged wrongful deaths stemming from the alleged breach because a third-party beneficiary's rights under any contract are no greater than the rights of the parties themselves, and the Federal Grant Agreements which plaintiffs allege to have been breached confer no right on any party to recover damages for personal injury or wrongful death in the event of their breach;

(e) Plaintiffs cannot recover against DeKalb County on a theory of negligence as a matter of law owing to said [157] Defendant's governmental immunity from suit based on such a theory.

WHEREFORE, Defendant, DeKalb County, Georgia prays that this Motion to Dismiss be inquired into and sustained, and that DeKalb County, Georgia be dismissed as a party defendant hereto.

(Signature and Certificate of Service omitted in printing)

(Caption omitted in printing)

[159] Filed: Jan. 4, 1974

MOTION TO STRIKE OF DEFENDANT, DEKALB COUNTY, GEORGIA

Comes now DEKALB COUNTY, GEORGIA, named Defendant in the above-styled action, and pursuant to Fed. Rules Civ. Proc., Rule 12 (e), 28 U.S.C.A., moves the Court to strike certain allegations from Plaintiffs' Complaint, showing the Court as follows:

1.

Defendant moves to strike Paragraph 27 from Plaintiffs' Complaint on the ground that said paragraph fails to state a claim upon which relief can be granted in that in Georgia, an action will not lie against a County for the alleged creation and/or maintenance of a public nuisance.

2.

Defendant moves the Court to strike Paragraph 24 from Plaintiffs' Complaint on the ground that said paragraph fails to state a claim upon which relief can be granted in the following particulars:

(a) Plaintiffs cannot be third party beneficiaries to the contracts claimed in said paragraph to have been breached by this defendant since there is no intent in such contracts [160] to confer upon third persons the type of benefit claimed by plaintiffs in this action;

(b) Plaintiffs cannot recover as third party beneficiaries for the breach of said contracts on the basis of their Complaint, the allegations of which, considered as a whole, clearly fail to allege any breach of contract;

(c) Plaintiffs cannot recover damages for wrongful death as third party beneficiaries to the contracts because a third party beneficiary's rights under any contract are no greater than the rights of the parties themselves, and the contracts which plaintiffs alleged to have been breached in said paragraph confer no right on any party to recover damages for personal injury or wrongful death.

3.

Defendant moves to strike from plaintiffs' Complaint all portions of paragraph 30 and all subsections thereof which allege negligence on the part of Defendant on the ground that said allegations fail to state a claim upon which relief can be granted in that a County in Georgia is not subject to suit based on negligence owing to governmental immunity.

WHEREFORE, Defendant DeKalb County, Georgia prays that this Motion to Strike be inquired into and sustained.

(Signature and Certificate of Service omitted in printing)

(Caption omitted in printing)

[180] Filed: Jan. 22, 1974

PLAINTIFFS' FIRST AMENDMENT TO COMPLAINT

1.

Plaintiffs amend Paragraph 4 of the Complaint by adding a sub-paragraph to be known as sub-paragraph (e) as follows:

"(e) AMERICAN HOME ASSURANCE COMPANY is a New York corporation, having an office and place of doing business in Fulton County, Georgia; service may be had by serving its agent for service, ROY OVERSTREET, at 1819 Peachtree Road, Suite 610, Atlanta, Fulton County, Georgia."

2.

Plaintiffs add a new paragraph to be numbered 34 and to read as follows:

"34.

Defendant AMERICAN HOME ASSURANCE COMPANY issued a policy of liability insurance to Defendant DEKALB COUNTY, GEORGIA, insuring said DEKALB COUNTY, GEORGIA, against liability for bodily injury or death with limits of $100,000.00 for each person and $1,000,000.00 for each accident, and containing the following waiver of Governmental Immunity:

[181]

'It is agreed that the company waives any right to deny liability under the policy or to refuse payment within the limits thereof by reason of the non-liability of the insured political subdivision for the wrongful or negligent acts of its agents and em-

ployees and its immunity from suit as an agency of the State performing governmental function.

Said Defendant AMERICAN HOME ASSURANCE COMPANY and Defendant DEKALB COUNTY, GEORGIA, are liable to Plaintiffs herein by reason of the provisions of said policy and by reason of the facts hereinabove set forth. A copy of said insurance policy is attached hereto, marked Exhibit "B", and made a part hereof by reference."

3.

Plantiffs amend their Complaint by adding the following new paragraphs number 35 through 57 to read as follows:

"35.

The UNITED STATES OF AMERICA, through the Department of Transportation and the Administrator of the Federal Aviation Administration, (hereinafter referred to as "F.A.A."), has been directed by Congress in the Federal Aviation Act of 1958, as amended, to assume responsibility as follows:

'to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.' 49 § 1348(a)."

"36.

The United States of America, through the Department of Transportation and the Administrator of the F.A.A., is further authorized by Congress in said Act to assume responsibility as follows:

'(1) to acquire, establish, and improve air-navigation facilities wherever necessary;

(2) to operate and maintain such air-navigation facilities; . . .

(4) to provide necessary facilities and personnel for the regulation and protection of air traffic.' 48 U.S.C. § 1348(b)."

"37.

The United States of America, through the Department of Transportation and the Administrator of the F.A.A. is further directed by Congress in said Act to assume responsibility as follows:

'to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.' 49 U.S.C. § 1348(c)."

"38.

The aforementioned directions to and placement of responsibility on the United States of America are pursuant to the Congressional determination found at 49 U.S.C. § 1303 that the United States of America, through the Administrator of the F.A.A., shall consider the following as being in the public interest:

'(a) The regulation of Air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense;

(b) The promotion, encouragement, and development of civil aeronautics;

(c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the [183] interest of safety and efficiency of both;

(d) The consolidation of research and development with respect to air navigation facilities, as well as the installation and operation thereof;

(e) The development and operation of a common system of air traffic control and navigation for both military and civil aircraft.' "

"39.

The United States of America, through the Department of Transportation and the Administrator of the F.A.A., is further given the duty by Congress in said Act as follows:

'to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time: . . .

(6) Such reasonable rules and regulations or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for . . . safety in air commerce.' 49 U.S.C. § 1421(a)(6)."

"40.

Pursuant to the aforesaid authority and directions from Congress the United States of America administers air traffic control of civil air operations within United States airspace; operates F.A.A. air route traffic control centers, airport traffic control towers, flight service stations, and related communications equipment required for control of air traffic; and collects and disseminates information relative to civil aeronautics and safety of flight."

"41.

Also pursuant to said Congressional authority and directions the United States of America has established as being necessary and operates air navigation facilities, including an Airport Traffic Control Tower (ATCT) at DeKalb-Peachtree Airport and a flight service station in Fulton County, Georgia, which flight [184] service station serves the geographical area in which DeKalb-Peachtree Airport is located."

"42.

An ATCT is a central operations facility in the terminal air traffic control system, consisting of a tower cab structure, including an associated IFR room if radar equipped, using air/ground communications and/or radar, visual signaling and other devices, to provide safe and expeditious movement of air and ground traffic."

"43.

The ATCT at DeKalb-Peachtree Airport is operated by the F.A.A. and is 'responsible for the safe, orderly and expeditious flow of air traffic in the vicinity of an [the] Airport.' 30 F.R. 3395, as amended; 16 F.R. 2975, 2979, revised 19 F.R. 2098, §24."

"44.

Said ATCT is manned by personnel (employed by the United States of America) 'who are responsible for the safe and orderly flow of air traffic in the vicinity of the Airport.' Their principal duties are as follows:

(a) 'To issue instructions to pilots for taxiing, take-off, approach for landing, and landing of aircraft.

(b) 'To inform pilots regarding field and weather conditions, air navigational facilities, emergency landing areas, restrictions to flight, regulations,

and other matters which may be of assistance to the pilot.

(c) 'To relay messages between pilots, airline operations offices, Air Route Traffic Control Centers, Weather Bureau offices, Communications Stations and other appropriate agencies concerning the operation, dispatch, and control of aircraft.

(d) 'To invoke emergency procedures when any emergency occurs or appears likely to occur to aircraft under tower control.

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(e) 'When equipped with airport surveillance and precision approach radar, to monitor aircraft arriving and departmentfrom an airport on instruments, and, in an emergency or upon request, issuing ground controlled approach instructions (GCA) for a let-down.' 16 F.R. 2974, 2979, revised 19 F.R. 2098, §24.

"45.

Pursuant to the authority and directions of Congress, the United States of America, through the Department of Transportation and the F.A.A., prior to the crash in question had issued Advisory Circular No. 150/5200-3A, dated March 2, 1972, entitled 'Bird Hazards to Aircraft,' in which the United States of America through said agencies stated in part as follows:

'Migratory birds, particularly waterfowl, are a hazard to aircraft due to their size and weight. In recognition of this potential hazard, F.A.A. Air Traffic Control and Flight Service Station facilities issue advisory information on bird activities when they are reported or when they have knowledge of such activities. Information given to pilots includes the position, species or size of bird if known, and their course and altitude.' "

"46.

The F.A.A. in said Advisory Circular also admitted that the birds of greatest potential hazard to aircraft because of size, abundance, or habit of flying in dense flocks, include starlings; that birds of these species are considered particularly hazardous during spring and fall migrations and when they are concentrated in wintering areas; and that at some airports there are large flocks of certain birds which could be a problem during certain seasons. DeKalb-Peachtree Airport is not named or referred to in said Advisory Circular."

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"47.

To cope with these admitted flight hazards, the Advisory Circular states that the United States of America, through the F.A.A., is operating as follows:

'F.A.A. Air Traffic Control and Flight Service Station facilities coordinate with airport management for either appropriate alerting action by a Notice to Airmen when flocks of birds are noted to remain in the airport vicinity or for possible closing by a Notice to Airmen when flocks roose on runways.' "

"48.

The Federal Government personnel providing terminal air traffic control services at airports, including DeKalb-Peachtree Airport, are required by the United States of America to be familiar with the provisions of the Terminal Air Traffic Control Manual, 7110.8, one of the air traffic control manuals referred to in Part 65 of the Federal Aviation Regulations, in which Manual are set forth the following duties and responsibilities of air traffic control personnel:

'If you observe or are informed of any condition which affects the safe use of a landing area:

(a) Relay the information to the airport manager concerned.

(b) Issue a Notice to Airmen publicizing an unsafe condition if you are unable to contact the airport manager (or if there is no airport manager designated) and then inform the manager as soon as practicable. . . .'

'122. BIRD ACTIVITY
ADDNL SVC

'a. Issue advisory information on the position and, if known, species or size of birds, and their course of flight and altitude if you believe that the safety of flight in that area may be affected. Do this for at least 15 minutes after receipt of such information from pilots or from adjacent facilities unless visual observation or subsequent reports reveal the activity is no longer a factor.'

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'1552. BIRD ACTIVITY INFORMATION

A. Issue advisory information pilot-reported or radar-observed and pilot-verified bird activity. Include position, species or size of birds, if known, course of flight and altitude. (E)

Phraseology:

FLOCK OF (Species, if known)/(size, if known) BIRDS, (number) O'CLOCK (number of miles) MILES (direction) BOUND:

LAST REPORTED AT (altitude, as determined from pilot report).

or

ALTITUDE UNKNOWN.
FLOCK OF (species, if known)/(size, if known) BIRDS (direction) BOUND ALONG (flyway or geographical route):

LAST REPORTED AT (altitude, as determined from pilot report).

or

ALTITUDE UNKNOWN.
FLOCK OF/NUMEROUS FLOCKS (species, if known)/(size, if known) BIRDS, VICINITY (location):

LAST REPORTED AT (altitude, as determined from pilot report).

or

LATITUDE UNKNOWN.
b. Relay bird activity information to adjacent facilities and to FSS's whenever it appears it will become a factor in their areas.' "

"49.

The Defendant UNITED STATES OF AMERICA, by and through its agents and employees, was guilty of negligence which proximately contributed to the death of RICHARDSON F. MIREE and LUCY ESTES MIREE in that the Atlanta Flight Service Station personnel and the DeKalb-Peachtree Airport air traffic control tower personnel negligently approved the IFR flight plan filed by the crew of the LEARJET and negligently cleared the LEARJET for takeoff from [188] Runway 20L, contrary to the provisions of the Terminal Air Traffic Control Manual referred to in paragraph No. 48 above, and the Advisory Circular referred to in paragraphs Nos. 45, 46 and 47 above, and the provisions of the Federal Register referred to in paragraphs Nos. 43 and 44 above."

"50.

The Defendant UNITED STATES OF AMERICA, by direction of Congress, is responsible for certification

of aircraft as airworthy and for issuing type and production certificates for aircraft, including the Learjet Model 24. The Defendant UNITED STATES OF AMERICA, by and through its agents and employees, was guilty of negligence which proximately contributed to the death of RICHARDSON F. MIREE and LUCY ESTES MIREE as follows:

(a) In issuing a type certificate, production certificate and airworthiness certificate for the Learjet Model 24, including the accident aircraft, without any restrictions as to use of the aircraft in areas of known bird hazards, when Defendant UNITED STATES OF AMERICA knew that the aircraft was capable of ingesting birds and that bird ingestion on takeoff would cause a power loss and a resulting dangerous hazard to the safety of the airplane and all persons aboard the airplane;

(b) In failing to place restrictions on the type certificate, production certificate and airworthiness certificate of the Learjet Model 24, forbidding operation of the aircraft in areas of known bird hazards;

(c) In failing to prohibit operation of Learjet Model 24 aircraft at DeKalb-Peachtree Airport, when Defendant UNITED STATE OF AMERICA knew that a bird hazard existed at said airport; and

[189]

(d) In failing to devise a system or procedure whereby Learjet Model 24 aircraft would not be cleared for takeoff at DeKalb-Peachtree Airport when a bird hazard was known by Defendant UNITED STATES OF AMERICA to exist at said airport, without first determining whether at the time of takeoff birds were present in sufficient quantity to be a menace and hazard to safety of flight."

"51.

(a) Georgia Code Section 11-402(2) defines an 'air-

port hazard' as any structure which is hazardous to the use of an airport for the taking off and landing of airplanes.

(b) Georgia Code Section 11-403 declares that an airport hazard endangers the lives and property of users of the airport and is therefore not in the interest of the public health, public safety or general welfare.

(c) Georgia Code Section 11-9902 declares that the violation of any airport zoning regulations shall constitute a misdemeanor.

(d) Section 1(b) of the 1960 DeKalb County Airport Zoning Resolution concerning DeKalb-Peachtree Airport defines an 'airport hazard' as any structure or use of land which is 'hazardous to such landing or taking off of aircraft.'

(e) Section 5 of the 1960 DeKalb County Airport Zoning Resolution declares that no use may be made of land within any airport approach surface zone, horizontal surface zone, conical surface zone or transitional surface zone at DeKalb-Peachtree Airport, in such manner as to endanger the landing, taking off or manuevering of aircraft.

[190]

(f) Section 8 of the 1960 DeKalb County Airport Zoning Resolution declares that no material change shall be made in the use of land at DeKalb-Peachtree Airport and no structure shall be erected, altered, planted or otherwise establish in any airport approach surface zone, horizontal surface zone, or conical surface zone unless a permit therefor shall have been applied for and granted. Said Section 8 also declares that no permit shall be granted that would allow the establishment or creation of an airport hazard or permit a non-conforming use or structure to become a greater hazard to air navigation.

(g) Section 14 of said 1960 DeKalb County Airport Zoning Resolution also declares that every violation of

said Resolution shall be punishable by fine or imprisonment, or both.

(h) The open garbage dump in question in this case is an airport hazard, as defined by Georgia Code Section 11-402(2) and Section 1(b) of the aforesaid Zoning Resolution. No permit was ever applied for or granted with respect to the establishment and operation of said open garbage dump. The maintenance of said open garbage dump is forbidden by Georgia Code Section 11-403, and by Sections 5 and 8 of said Zoning Resolution. The actions of Defendant DEKALB COUNTY, GEORGIA, in establishing and operating said open garbage dump violated the aforesaid laws of Georgia and the aforesaid Zoning Resolution, and constitute negligence per se proximately contributing to the death of RICHARDSON F. MIREE and LUCY ESTES MIREE."

"52.

Defendant DEKALB COUNTY, GEORGIA, was also guilty of negligence per se proximately contributing to the death of RICHARDSON F. MIREE and LUCY ESTES MIREE in that Defendant [191] DEKALB COUNTY, GEORGIA, enhanced and increased the bird-attracting nature of said open garbage dump by failing to place a compacted layer of at least six inches of clean earth over all exposed solid waste at the end of each day's operation, and by failing to spread solid waste in uniform layers not over two feet thick, and by failing to compact solid waste prior to covering with earth, and by otherwise operating and maintaining said open garbage dump in violation of the Georgia Solid Waste Management Act (Georgia Code Sections 43-1601, *et. seq.*) and the Rules and Regulations of the Georgia Department of Natural Resources, Environmental Protection Division, concerning Solid Waste Management (Rules and Regula-

tions of the State of Georgia, Sections 391-1-1-.1 *et. seq.*)."

"53.

At all times relevant it was the duty of Defendant DEKALB COUNTY, GEORGIA, to operate and manage DeKalb-Peachtree Airport in a safe condition. Defendant DEKALB COUNTY, GEORGIA, was guilty of negligent acts and failures to act and dereliction of duties proximately contributing to the death of RICHARDSON F. MIREE and DOROTHY ESTES MIREE, in that Defendant DEKALB COUNTY, GEORGIA, at all times relevant had actual, personal knowledge of the bird hazard and unsafe condition that existed at the Airport, and in that Defendant DEKALB COUNTY, GEORGIA, had ample opportunity either to remove the bird hazard and unsafe condition or to prohibit the operation of jet aircraft at the Airport, and in that Defendant DEKALB COUNTY, GEORGIA, failed to heed the warnings of the F.A.A. and others concerning such bird hazard and unsafe condition, and in that [192] Defendant DEKALB COUNTY, GEORGIA, willfully, wantonly, recklessly and negligently failed either to alleviate the bird hazard and unsafe condition, or to prohibit operation of jet aircraft at the Airport, or to warn the flight crews of jet aircraft of the bird hazard and unsafe condition, or to devise a system, plan or procedure for the warning of jet flight crews of the bird hazard or unsafe condition."

"54.

The willful, wanton nature of the negligence and dereliction of duties of Defendant DEKALB COUNTY, GEORGIA, and the seriousness of the negligence and carelessness of Defendant UNITED STATES OF AMERICA are exemplified by the fact that prior to the fatal crash in question, Defendant DEKALB COUNTY, GEORGIA, and Defendant UNITED

STATES OF AMERICA had received notice of several airplane bird-strike or near bird-strike incidents within the airport boundaries, but despite this knowledge of prior incidents Defendant DEKALB COUNTY, GEORGIA, and Defendant UNITED STATES OF AMERICA failed to take any action at all to prevent a recurrence of such incidents."

"55.

(a) DeKalb-Peachtree Airport is not owned, operated, managed and maintained by Defendant DEKALB COUNTY, GEORGIA, as a governmental function or enterprise, but, instead, is owned, operated, and maintained and managed by Defendant DEKALB COUNTY, GEORGIA, as a proprietary or ministerial [193] function or enterprise. In this connection, Plaintiffs show that Defendant DEKALB COUNTY, GEORGIA, leases substantial portions of the Airport to private companies engaged in commercial operations for profit; that some of such leases are for fixed rental amounts and the remaining leases are for fixed rental amounts plus a percentage of the revenues or income derived by the genants from their commercial operations; that the revenues thus obtained by Defendant DEKALB COUNTY, GEORGIA, are not insignificant, but are substantial; and that the Airport is owned, operated, managed and matintained by Defendant DEKALB COUNTY, GEORGIA, primarily as a source of revenue for Defendant DEKALB COUNTY, GEORGIA. In effect, with respect to ownership, operation, management and maintenance of the Airport, Defendant DEKALB COUNTY, GEORGIA acts as a private landlord and not as a governmental entity.

(b) Plaintiffs show that prior to the date of the crash in question, Defendant DEKALB COUNTY, GEORGIA, purchased the policy of liability insurance

from Defendant AMERICAN HOME ASSURANCE COMPANY which is referred to hereinabove, providing bodily injury liability insurance to Defendant DEKALB COUNTY, GEORGIA, with respect to the ownership, operation, management and maintenance of DeKalb-Peachtree Airport by said Defendant DEKALB COUNTY, GEORGIA, said policy containing a 'Waiver of Governmental Immunity' which is set out hereinabove.

(c) Defendant DEKALB COUNTY, GEORGIA, is not entitled to the benefit or protection of the doctrine of sovereign immunity with respect to the claims of Plaintiffs herein."

[194] "56.

Plaintiffs show that by virtue of the operation of DeKalb-Peachtree Airport by Defendant DEKALB COUNTY, GEORGIA, under the Uniform Airport Act (Georgia Code Section 11-204, *et seq.*), and under the Federal Airport and Airway Development Act (49 U.S.C. §§ 1711, *et seq.*), and its predecessor, the Federal Airport Act (49 U.S.C. §§ 1101, *et seq.*), and by virtue of the Grant Agreements and payments of Federal funds referred to earlier in this lawsuit, and by virtue of the application of the provisions of the Georgia Solid Waste Management Act and the Rules and Regulations of the Georgia Department of Natural Resources, Environmental Protection Division (Solid Waste Management) to the facts of this case, and by virtue of the application of the 1960 DeKalb County Airport Zoning Resolution to the facts of this case, an express or implied statutory waiver of the doctrine of sovereign immunity exists with respect to the claims of Plaintiffs against Defendant DEKALB COUNTY, GEORGIA. In the alternative, as a result of the acts and failures to act of Defendant DEKALB COUNTY, GEORGIA, as alleged herein, and as a result of the

acceptance and retention of benefits by the Defendant DEKALB COUNTY, GEORGIA, under the various statutes, rules and regulations and Grant Agreements referred to herein, Defendant DEKALB COUNTY, GEORGIA, either expressly or impliedly has waived any defense based upon the doctrine of sovereign immunity, with respect to the claims of Plaintiffs herein."

[195] "57.

Plaintiffs allege that Defendant DEKALB COUNTY, GEORGIA, is not entitled to the defense of sovereign immunity because *Ga. Code Ann.* § 23-1502, which reads

> "A county is not liable to suit for any cause of action unless made so by statute",

is unconstitutional in that such statute violates the equal protection and due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States and of Article I, Section I, Paragraphs II and III of the Constitution of Georgia by reason that such statute, on its face and as applied to the Plaintiffs and Defendant DEKALB COUNTY, GEORGIA:

1. denies Plaintiffs due process of law,

2. denies Plaintiffs equal protection of law, and

3. creates an arbitrary classification which contravenes the due process requirements of the federal and state Constitutions."

(Signature Omitted in Printing)

AMERICAN HOME ASSURANCE COMPANY
NEW YORK, NEW YORK A CAPITAL STOCK COMPANY FOUNDED 1853

AVIATION INSURANCE POLICY
Issued Through
WESTMINSTER
INSURANCE MANAGERS, INC.

275 FOREST AVENUE
PARAMUS, NEW JERSEY 07652

TELEPHONE AREA CODE 201 265-4515
WESTERN UNION TELEX 13-4338

PLEASE READ YOUR POLICY

IN EVENT OF ACCIDENT

1. Get immediate first aid for all injured parties.
2. Protect the aircraft whether the loss is insured or not.
3. Give no statements to anyone except police officers, F.A.A. officials (or other government officials having jurisdiction over civil aviation) and your Insurance Company representative.
4. Secure all possible information including names and addresses of those involved and witnesses.
5. Report all accidents to Westminster Insurance Managers, Inc. promptly. If BODILY INJURY is involved Telex or Telephone and follow with written report.

"The air, to an even greater extent than the sea, is terribly unforgiving of any carelessness, incapacity or neglect".

AMERICAN HOME ASSURANCE COMPANY
NEW YORK, NEW YORK

(A stock company, hereinafter called the company)

Agrees with the insured named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and application and subject to the Limits of Liability, Exclusions, Conditions and other terms of this policy to afford insurance only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges as set forth in the declarations.

Insuring Agreements

1. Insurance Coverages Defined

Aircraft Liability. To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of:

Coverage A — Bodily Injury sustained by any person except a passenger;

Coverage B — Property Damage, injury to property of others;

Coverage C — Passenger, injury sustained by any passenger;

Coverage D — Single Limit, injury sustained by any person and injury to property of others;

Coverage E — Single Limit, injury sustained by any person, except a passenger and injury to property of others;

caused by an occurrence and arising out of the ownership, maintenance or use of the aircraft.

Coverage F — Medical Coverage. To pay all reasonable expenses incurred within one year from the date of accident, for necessary medical, surgical, dental, ambulance, hospital, professional nursing and funeral services, to or for each passenger who sustains injury caused by accident, provided the aircraft is being used by the named Insured or with his permission. This Coverage shall not apply to any pilot, attendant, or other crew member of the aircraft, unless "crew" is expressly specified as included in the Declarations.

Hull Coverages — To pay for direct loss of or damage to the aircraft, subject to the exclusions, conditions and other terms of this policy when caused by:

Coverage G — All Risks of Physical Loss or Damage to the Aircraft. The aircraft shall be presumed lost in flight if it disappears after take-off and is not located nor its whereabouts reported within sixty days thereafter;

Coverage H — All Risks of physical loss or damage to the aircraft while not in motion;

Coverage I — All Risks of physical loss or damage to the aircraft while not in flight;

Coverage J — As endorsed hereon

II. Defense, Settlement, Supplementary Payments (Coverages A, B, C, D and E). As respects such insurance as is afforded by the other terms of this policy, the company shall: (a) defend in his name and behalf any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent, but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company; (b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, all costs taxed against the insured in any such suit, all expenses incurred by the company, all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, expenses incurred by the insured, in the event of bodily injury, sickness or disease, for such immediate medical and surgical relief to others as shall be imperative at the time of the occurrence; and (c) reimburse the insured for expenses, other than loss of earnings, incurred at the company's request.

The company agrees to pay the amounts incurred under this Insuring Agreement, except settlement of claims and suits, in addition to the applicable limit of liability of this policy.

III. Definition of "Insured" (Coverages A, B, C, D, E and F). The unqualified word "insured" wherever used includes not only the named insured but also any person while using the aircraft and any person or organization legally responsible for its use, provided the actual use is with permission of the named insured. The provisions of this paragraph do not apply: (a) to any person or organization with respect to bodily injury, sickness, disease or death of any person who is a named insured, (b) to any employee or official of an insured with respect to any action brought against said employee or official because of bodily injury, sickness, disease or death of another employee of the same insured injured in the course of such employment in an occurrence arising out of the maintenance or use of the aircraft in the business of such insured, (c) to any person or organization, or to any agent or employee thereof (other than agents or employees of the named insured) engaged in the manufacturing of aircraft, aircraft engines, or aircraft accessories, or operating an aircraft repair shop, airport, hangar, aircraft sales agency, flying club or flying school, with respect to any occurrence arising out of the manufacture or the operation thereof; (d) to any person or organization (other than the named insured) operating the aircraft under the terms of any rental agreement or to any person or organization or any agent or employee thereof (other than the named insured, its agents and employees) operating the aircraft under the terms of any training program which provides any remuneration to the named insured for the use of said aircraft.

IV. Use of Other Aircraft (Pleasure and Business or Industrial Aid Uses Only—Coverages A, B, C, D, E and F). Such insurance as is afforded by this policy with respect to the aircraft applies to the named insured, if an individual and the owner of such aircraft with respect to the operation of any other aircraft of similar type, horsepower and seating capacity by such named insured or with respect to the presence of such named insured in such other aircraft. This insuring agreement does not apply: (a) to any aircraft owned in full or in part by, licensed in the name of, hired as part of a frequent use of hired aircraft by, or furnished for regular use to the named insured or a member of his household; (b) to any occurrence arising out of the operation of an airport, aircraft repair shop, hangar, aircraft sales agency, flying school, flying club or the manufacture of aircraft, aircraft engines or aircraft accessories.

V. Temporary Use of Substitute Aircraft (Coverages A, B, C, D, E and F). While an aircraft owned by the named insured is withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction, such insurance as is afforded by this policy with respect to such aircraft applies with respect to another aircraft of similar type, horsepower and seating capacity not so owned while temporarily used as the substitute for such aircraft. This insuring agreement does not cover as an insured the owner of the substitute aircraft or any agent or employee of such owner.

VI. Automatic Insurance for Newly Acquired Aircraft (Pleasure and Business or Industrial Aid Uses Only) (Liability, Medical and Hull Coverages A, B, C, D, E, F, G, H and I). If the named insured who is the owner of the aircraft acquires ownership of another aircraft of similar type, horsepower and seating capacity and so notifies the company within ten days following the date of its delivery to him, such insurance as is afforded by this policy applies also to such aircraft as of such delivery date: (a) if it replaces an aircraft described in this policy, but only to the extent the insurance is applicable to the replaced aircraft, or (b) if it is an additional aircraft and if the company insures all aircraft owned by the named insured at such delivery date.

Unless otherwise agreed in writing between the named insured and the Company, the Coverages Limits of Liability and Amount of Insurance for such newly acquired aircraft shall be as respects:

(a) Liability and Medical Coverages — not to exceed the limits originally provided for any owned aircraft;

(b) Hull Coverages — the actual cost of the aircraft to the named insured, but not to exceed the highest amount of insurance on any described aircraft and subject to the same deductibles.

This insuring agreement does not apply: (a) to any loss against which the named insured has other valid and collectible insurance, or (b) except during the policy period, but if such delivery date is prior to the effective date of this policy, the insurance applies as of such effective date.

The named insured shall pay any additional premium required because of the application of the insurance to such other aircraft. The insurance terminates upon a replaced aircraft on the delivery time and date.

VII. Occurrences, Policy Period, Territory, Purpose of Use. This policy applies only to occurrences during the policy period while the aircraft is within the United States of America (excluding Alaska), Canada, or the Republic of Mexico, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto.

Exclusions

This policy does not apply:

1. to bodily injury, sickness, disease or death of any employee of the insured while engaged in the duties of his employment or to any obligation for which the insured or any company as his insurer may be held liable under any Workmen's Compensation Law;

2. to liability assumed by the insured under any contract or agreement;

3. while, with the knowledge and consent of an insured—
   (a) the aircraft is being operated by an approved pilot who commences a flight in violation of the terms and limitations of his Federal Aviation Agency Pilot Certificate or Medical Certificate;
   (b) the aircraft is being used for any unlawful purpose; or
   (c) the aircraft is being operated in any flying in respect to which a waiver issued by any Government Department or Organization is required whether granted or not, or is being used for closed course racing, spraying, or dusting, seeding, fish stocking, or any form of hunting or acrobatics at an altitude of less than 1,000 feet, unless this policy is specifically endorsed to include such uses;
   (d) The aircraft is in flight unless its Airworthiness Certificate is in full force and effect

4. as respects property damage under coverage B, D and E to injury to or destruction of property owned, rented, occupied or used by or in the care, custody or control of or carried in or on any aircraft of the insured;

5. as respects coverages G, H, I and J to any loss or damage to aircraft insured hereunder (a) due to and confined to wear and tear, deterioration, freezing or mechanical, structural, or electrical breakdown or failure unless such damage is the result of other loss covered by this policy; (b) conversion, embezzlement or secretion by a person in lawful possession or custody of the aircraft, and any damage or loss resulting therefrom until the aircraft is in the actual possession of the insured, (c) damage to tires, unless stolen or coincident with other damage covered by this policy; nor under any circumstances to robes, wearing apparel, flight charts, computers, manuals or any personal effects,

6. to any aircraft insured as a landplane with wheel landing gear hereunder which is converted to a seaplane or skiplane unless previously approved by the company nor to any aircraft if its airworthiness certificate has been converted, during the policy period, to the Restricted or Experimental category;

7. while the aircraft is being operated in flight by any pilot other than the pilot(s) named or described in Item 9 of the declarations unless specifically approved by endorsement attached to this policy.

8. (Noise)
   (a) to loss or damage or any liability of the Insured resulting from, arising out of, or in any way connected with Aircraft Noise, nuisance and/or compensation for the taking, use or acquisition of rights to property or airspace regardless of whether such claims are made directly against the Insured or by virtue of any agreement entered into by or on behalf of the Insured. As used herein "Noise" includes vibration, sonic boom and any phenomena associated therewith,
   (b) the Liability of the Company arising out of any agreement entered into by or on behalf of the Insured and noted by the Company for the purposes of the Policy shall not include any liability in respect of claims excluded by paragraph (a),
   (c) with respect to any provision in the Policy concerning any duty of the Company to investigate or defend claims, such provision shall not apply and the Company shall not be required to defend:
      (i) damages awarded against the Insured and
      (ii) defense fees and expenses incurred by the Insured.

9. (War & Other Perils)
to claims directly or indirectly arising from any one or any combination of any of the following causes or any consequence thereof:
   (a) war, invasion, acts of foreign enemies, hostiles (whether war be declared or not), civil war, rebellion, revolution or insurrection, including malicious acts in furtherance of any of the foregoing;
   (b) any hostile detonation of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force matter;
   (c) any act of one or more persons, whether or not agents of a sovereign power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional;
   (d) confiscation, nationalization, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any government (whether civil, military or de facto) or public or local authority.

10. (Radioactive Contamination)
   (a) to loss or destruction of or damage to any property whatsoever or any loss or expense whatsoever resulting or arising therefrom or any consequential loss,
   (b) any legal liability of whatsoever nature directly or indirectly caused or contributed to by or arising from ionizing radiations or contamination by radioactivity from any source whatsoever.

1. Name of Insured: Board of Commissioners of De Kalb County

2. Address: De Kalb County Courthouse, Decatur, Georgia 30032 [ ] INDIVIDUAL(S) [ ] CORPORATION [ ] PARTNERSHIP

3. Policy Period: From 12:01 A.M. [ ] P.M. August 6, 1972 To August 6, 1973
12:01 A.M. Standard Time at the address of the Insured named in Item 2 as Standard Time.

4. Business of Insured: Municipality

5. Aircraft based at — Insurable Interest: [ ] Owner [ ] Lessee [ ] Temporary Custody

6.

LIABILITY COVERAGES	LIMITS OF LIABILITY: Each Person	Each Occurrence	LIABILITY PREMIUMS	HULL COVERAGES IDENTIFIED
A. Bodily Injury—except Passengers	$	$	$	G. All Risks
B. Property Damage	X X X X			H. All Risks not in motion
C. Passenger				I. All Risks not in flight
D. Single Limit—including Passengers*	X X X X			J. As endorsed
E. Single Limit—except Passengers	X X X X			
F. Medical Payment [ ] incl. [ ] excl. Crew				DEDUCTIBLES Each Aircraft Each Loss Except Fire, Theft, Lightning, and Explosion
Endorsement No. (s) 1, AGO			1500.	
* The limit of liability for any one Passenger shall not exceed	$ ----------	Total Liability Premium	$ 1500.	

7. DESCRIPTION OF AIRCRAFT & HULL COVERAGES HEREUNDER

Make and Model	F.A.A. Registration Number	Land Plane Fixed W. Rotary W.	Year Model	Seats Incl. Crew	Hull Coverage	Amount of Insurance	Hull Premiums	Not In Motion	In Motion
Does Not Apply						$	$	$	$

F.A.A. Category: [ ] Normal [ ] Restricted [ ] Utility [ ] Aerobatic — Breach of Warranty Premium — ** Unhangared Deductible

F.A.A. Class: [ ] Standard [ ] Transport [ ] Limited [ ] Experimental — **$ ----- — Hull Premium $ ----- — Policy Premium $ 1500.

deductible applies to each loss from Windstorm, Cyclone, Tornado, Hail, Sleet, Snow or Theft when not regularly hangared at home airport.

8. Uses — Does Not Apply

9. Pilots

10. Exceptions, if any (see below)

No insurer has cancelled, declined to issue or renew any insurance pertaining to an aviation risk for the insured except as stated above. The aircraft described herein are fully owned by the insured unless otherwise stated in Items 4 and 10 above. If a mortgagee, conditional vendor or assignee is named above, loss, if any, under coverages G, H, I or J shall be payable to the named insured and to such additional interest as may appear.

Agent or Broker: Fairfax Underwriters Services, Inc. 127 W. 10th St., Kansas City, Mo.

Countersigned by _____ WESTCHESTER _____

Form 30 Rev. 4-72 (Ga.) — See Reverse side for Policy Definitions — For the Company

BEST COPY AVAILABLE

The limit of liability for sections I, II, III, and IV of this endorsement are as specified in this schedule. The insurance afforded by this endorsement is only with respect to such and so many of the coverages and sections as are indicated thereon by specific premium charge or charges for such coverages and sections.

Liability Coverages	Limits of Liability Each Person	Each Accident
Bodily Injury	$ 100,000.	$ 1,000,000.
Property Damage	X X X X X	$ 1,000,000.
Single Limit – Including Passengers	X X X X X	$

SECTION I PREMISES – OPERATIONS Location of premises and purpose for which premises are used	Part Occupied by Insured	PREMIUMS Bodily Injury	Property Damage
De Kalb-Peachtree Airport Chamblee, Georgia	Entire	$ 250.	$ 250.

SECTION II PRODUCTS (including Completed Operations) - Description	Estimated Sales	Rates per $1,000 of Sales Bodily Inj.	Prop.Damage	ESTIMATED PREMIUMS Bodily Injury	Property Damage
New Aircraft Sales	$	$	$	$	$
Used Aircraft Sales					
Aircraft fuel and lubricants					
Repair and Service					
Parts and Accessories - not installed					

Aggregate Limits – B.I. $_____ P.D. $_____ Single Limit $_____

SECTION III CONTRACTUAL – Identification of Contracts	ESTIMATED PREMIUMS Bodily Injury	Property Damage
	$	$

Aggregate Limits P.D. $

SECTION IV ALTERATIONS – Description	ESTIMATED PREMIUMS Bodily Injury	Property Damage
	$	$

Aggregate Protective Limits P.D. $

SECTION V HANGARKEEPERS LEGAL LIABILITY	PREMIUM Bodily Injury	Property Damage
	X X X	$

LIMITS OF LIABILITY: Any One Aircraft $_____ Any One Loss $_____
Airports Locations Hangars

☐ Including Taxiing ☐ Excluding Taxiing Deductible Each Aircraft, Each Loss $_____

MINIMUM PREMIUMS –	Sect. I	Sect. II	Sect. III	Sect. IV	TOTAL PREMIUMS
Bodily Injury	$ 250.	$	$	$	
Property Damage	$ 250.	$	$	$	$ 250. $ 250.
Single Limit	$	$	$	$	

This endorsement, including all provisions and statements set forth hereon and on the second page hereof, is effective on August 6, 19 72 attached to and forming part of Policy No. 214083

issued by American Home Assurance Company

Name of Insured Board of Commissioners of De Kalb County

Westminster Insurance Mgrs., Inc.
For the Company

No. 26/ 9-65 End. No. 1 Page 1

It is hereby understood and agreed that only as respects the coverages afforded by the various sections of this endorsement:

(1) the words "excluding passengers" shall be deleted from "Bodily Injury Liability - Excluding Passengers" of the insuring agreements of the policy and policy declarations (2) as respects Property Damage Liability, the word "occurrence" wherever used in the policy shall be deleted and the word "accident" substituted therefor. This Policy does not cover any liability imposed upon the insured by any Federal, State or Local Statute relating to the selling, giving or dispensing of intoxicating liquors.

Section I – Premises – Airport Liability

1. The Policy is extended to apply with respect to the ownership, maintenance or use, for the purposes stated in schedule, of the premises designated therein, and all operations of the named insured at or away from the premises which are necessary or incidental to such purposes.

2. Definition of "insured." As respects Section I of this endorsement, the unqualified word "insured" means any partner, executive officer or director of the named insured while acting within the scope of his duties as such.

3. Additional Exclusions – The Policy does not apply under Section I of this endorsement to:

(a) any aircraft owned by, hired by or for, or loaned to the insured or to any aircraft in flight by or in the interest of the insured;

(b) any airmeet, air race, demonstration or show;

(c) any grandstand or group seating structure of any kind where the highest seating surface is in excess of six feet from the ground;

(d) watercraft while away from the premises, or power driven land vehicles and vehicles attached thereto, including loading and unloading thereof, while away from the premises or the ways immediately adjoining;

(e) any elevator other than an elevator which is not operated, maintained or controlled by the insured and is located in a building of which the insured is not the owner, general lessee or sole tenant;

(f) liability with respect to which insurance is or can be afforded under the printed provisions of the Policy or any other section of this endorsement;

(g) operations on or from other premises which are owned, rented or controlled by the insured;

(h) any of the following in so far as any of them occur on or from premises owned by or rented to the named insured and injure or destroy buildings or contents thereof and are not due to fire: (1) the discharge, leakage or overflow of water or steam from plumbing, heating, refrigerating or air-conditioning systems, standpipes for fire hose, or industrial or domestic appliances, or any substance from automatic sprinkler systems, (2) the collapse or fall of tanks or the component parts or supports thereof which form a part of automatic sprinkler systems, or (3) rain or snow admitted directly to the building interior through defective roofs, leaders or spouting, or open or defective doors, windows, skylights, transoms or ventilators;

(i) injury to or destruction of premises alienated by the named insured out of which the accident arises;

(j) liability assumed by the insured under any contract or agreement.

Section II – Products Liability

1. The Policy is extended to apply with respect to:

(a) the handling or use of, the existence, of any condition in or a warranty of goods or products manufactured, sold, handled or distributed by the named insured, other than equipment rented to or located for use of others but not sold, in connection with the operations conducted by the named insured at the premises, if the accident occurs after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the insured or on premises for which the classification stated in the company's manual excludes any part of the foregoing;

(b) operations, in connection with operations conducted by the named insured at the premises, if the accident occurs after such operations have been completed or abandoned at the place of occurance thereof and away from premises owned, rented or controlled by the insured, except (a) pick-up and delivery and (b) the existence of tools, uninstalled equipment and abandoned or unused materials; provided, operations shall not be deemed incomplete because improperly or defectively performed or because further operations may be required pursuant to a service or maintenance agreement.

All damages arising out of one prepared or acquired lot of goods or products shall be considered as arising out of one accident. The aggregate limit of liability as set forth in Section II of schedule is the total limit of the Company's liability on account of all accidents which occur during the policy period.

2. Definition of "insured." As respects Section II of this endorsement, the unqualified word "insured" means any partner, executive officer or director of the named insured while acting within the scope of his duties as such.

3. Additional Exclusions. The Policy does not apply under Section II of this endorsement to:

(a) injury to, or destruction including loss of use, of any aircraft or products, manufactured, sold, handled or distributed or work completed by or for the named insured out of which the accident arises;

(b) liability assumed by the insured under any contract or agreement other than a warranty of goods or products.

4. Premium. The earned premium under Section II shall upon termination of the Policy be computed in accordance with the Company's rules, rates, rating plans, premiums and minimum premiums applicable to this insurance. If the earned premium thus computed exceeds the estimated premium paid, the named insured shall pay the excess to the Company; if less, the Company shall return to the named insured the unearned portion paid by such insured.

5. When used as a premium basis, the word "sales" shall mean the gross amount of money charged by the named insured or by others trading under his name for all goods and products sold or distributed during the policy period, and charged during the policy period for installation, servicing or repair, and includes taxes, other than taxes which the named insured and such others collect as a separate item and remit directly to a governmental division.

6. Inspection and Audit. The Company shall be permitted to inspect the insured premises, operations, and aircraft and to examine and audit the insured's books and records at any time during the Policy period and any extension thereof and within one year after the final termination of this Policy, as far as they relate to the premium basis or the subject matter of this insurance.

Section III – Contractual Liability

1. The coverage provided by the Policy is extended to include liability assumed by the named insured under such contracts as are itemized under Section III of the schedule of this endorsement, subject to Policy Terms, Conditions, Limitations and Exclusions.

2. Additional Exclusions. The Policy does not apply under Section III of this endorsement to:

(a) liability assumed under any contract or agreement not itemized in the schedule;

(b) any of the following in so far as any of them occur on or from premises owned by or rented to the named insured and injure or destroy buildings or contents thereof and are not due to fire: (1) the discharge leakage or overflow of water or steam from plumbing, heating, refrigerating or air-conditioning systems, standpipes for fire hose, or industrial or domestic appliances, or any substance from automatic sprinkler systems, (2) the collapse or fall of tanks or the component parts or supports thereof which form a part of automatic sprinkler systems, or (3) rain or snow admitted directly to the building interior through defective roofs, leaders or spouting, or open or defective doors, windows, skylights, transoms or ventilators;

(c) injury to or destruction of premises alienated by the named insured out of which the accident arises;

(d) injury to, or destruction of any aircraft or products manufactured, sold, handled or distributed or work completed by or for the named insured out of which the accident arises.

The aggregate limit of liability set forth in Section III of the schedule is the total limit of the Company's liability on account of all damages arising out of injury to or destruction of property with respect to each contract.

continued on reverse side

No. 26-2 Rev. 6-1970 End. No. 1 Page 2

issued to Board of Commissioners of De Kalb County

This endorsement, effective August 6, 1972 (12:01 A.M., standard time, at address of the insured) forms a part of policy No. 214033

In Consideration of ☐ Additional Premium / ☐ Return Premium \ of $ Nil for days % is of $

It is hereby Understood and Agreed that:

1. The premium for the policy is due and payable as follows:

August 6, 1972	$500.
August 6, 1973	$500.
August 6, 1974	$500.

2. Waiver of Governmental Immunity

"It is agreed that the company waives any right to deny liability under the policy or to refuse payment within the limits thereof by reason of the non-liability of the insured political subdivision for the wrongful or negligent acts of its agents and employees and its immunity from suit as an agency of the State performing governmental function."

The provisions of the following pages, if any, are a part of this endorsement. All other terms and conditions of this policy remain unchanged.

Westminster Insurance Managers, Inc.

For the Company

NO. 8-6-69

End. No. 2 Page 1

issued to ...d Commissioners of De Kalb County

This endorsement, effective August 6, 1972 (12:01 A.M., standard time, at address of the insured) forms a part of policy No. 21408?

In Consideration of ☐ Additional Premium / ☐ Return Premium \ of $ _____ for days % is of $

It is hereby Understood and Agreed that:

ANNUAL REVIEW

This policy is subject to automatic notice of cancellation to take effect upon anniversary date (s).

The provisions of the following pages, if any, are a part of this endorsement. All other terms and conditions of this policy remain unchanged.

Westminster Insurance Managers, Inc.

For the Company

NO. 8-6-69

End. No. 2 Page 2

Conditions

1. Definitions:

(a) **Aircraft** wherever used in this policy shall mean the aircraft described herein including engines, propellers, operating and navigation instruments and radio equipment attached or usually attached thereto including parts detached and not replaced by other similar parts. When two or more aircraft are insured hereunder, the terms of this policy shall apply separately to each.

(b) **In Flight** wherever used in this policy shall mean the period from the time the aircraft (other than a watercraft) moves forward in taking off or in attempting to take off for an intended flight, while in the air, and until the aircraft completes its landing and taxiing run after contact with the land or (when equipped with flotation gear) the water. A watercraft shall be deemed to be "in flight" when the rotors are in motion as a result of engine power, the momentum generated therefrom or navigation.

(c) **In Motion** means all times when the aircraft is "in flight" and in addition, whenever the aircraft is moving under its own power or the momentum generated thereby.

(d) **Fire** wherever used in this policy shall mean fire, lightning, explosion, self-ignition unless fire or explosion is caused directly or indirectly by collision of the aircraft with the ground, water or any object.

(e) **Theft** wherever used in this policy shall mean theft, robbery, larceny or pilferage including damage done by thieves.

(f) **Pleasure and Business** is defined as personal, pleasure, family and business uses, excluding any operation for which a charge is made except that shared expenses limited to fuel costs and storage fees for a particular flight shall not be deemed a charge.

(g) **Industrial Aid** is defined as the transportation of officials, employees, guests, merchandise and all uses enumerated in the definition of Pleasure and Business but excluding any operation for which a charge is made except that shared expenses limited to fuel costs and storage fees for a particular flight shall not be deemed a charge.

(h) **Instruction and Rental** is defined as used principally in the business of the insured, including student instruction, rental to others and Pleasure and Business purposes but excluding passenger carrying for hire.

(i) **Limited Commercial** is defined as used principally in the business of the insured including passenger or freight carrying for hire and Pleasure and Business uses, but excluding instruction to or rental to others.

(j) **Commercial** includes all uses enumerated in the definitions of Instruction and Rental and Limited Commercial.

(k) **Passenger** shall mean any person or persons while in, entering or leaving the aircraft for the purpose of flight other than the pilot, co-pilot, members of the crew, employees and officials while in the course of their employment by the insured.

(l) **Occurrence** means an accident, or a continuous or repeated exposure to conditions, which results in injury during the policy period, provided the injury is accidently caused. All damages arising out of such exposure to substantially the same general conditions shall be considered as arising out of one occurrence.

(m) **Injury** as respects any person, means bodily injury, sickness including mental anguish, disease or death resulting therefrom; and as respects any property, means injury to or destruction of the property including loss of use thereof.

(n) **Assault and Battery** shall be deemed an occurrence but, when committed by or at the direction of the insured, it shall not be deemed an occurrence unless committed for the purpose of preventing dangerous interference with the operation of the aircraft.

(o) **Federal Aviation Agency** or "F.A.A." shall also include the Civil Aeronautics Board or the duly constituted National Authority having jurisdiction over civil aviation in any recognized country.

2. Notice of Occurrence, Injury, Damage or Claim (Coverages A, B, C, D, E and F). When an occurrence, injury, damage or claim takes place, written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the occurrence, the names and addresses of the injured and of available witnesses.

3. Notice of Claim or Suit (Coverages A, B, C, D, E and F). If claim is made or suit brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

4. Limits of Liability (Coverages A, B, C, D, E and F). The limit of liability stated in the declarations is the limit of the company's liability for all damages arising out of the one occurrence.

The limit of liability stated in the declarations for coverages A and C as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one occurrence; the limit of such liability stated in the declarations as applicable to "each occurrence" is, subject to the above provision respecting each person, the total limit of the company's liability for all damages including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom sustained by two or more persons in any one occurrence. The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

5. Assistance and Cooperation of the Insured. The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expenses other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

6. Action Against Company. No action shall lie against the company under coverages A, B, C, D and E, unless as a condition precedent thereto, the insured shall have fully complied with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement between the insured, the claimant and the company. Any person or his legal representative who has secured such judgment or written agreement shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the insured. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

Under coverages G, H, I and J payment for loss may not be required and no action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy and until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy, and unless such action is commenced within twelve (12) months next after the happening of the loss.

7. Financial Responsibility Laws (Coverages A, B, C, D and E). Such insurance as is afforded by this policy for bodily injury liability or property damage liability shall comply with the provisions of any financial responsibility law of any State or Province which shall be applicable to aircraft with respect to any such liability arising out of the ownership, maintenance or use of the aircraft during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

8. Medical Reports; Proof and Payment of Claim (Coverage F). As soon as practicable the injured person or someone on his behalf shall give to the company written proof of claim, under oath if required, and shall after each request from the company, execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

The company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute admission of liability of the insured or, except hereunder, of the company.

9. Other Insurance. If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance under Insuring Agreements V and VI shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to the aircraft or otherwise against a loss covered under either or both of said Insuring Agreements.

10. Insured's Duties When Loss Occurs (Coverages G, H, I and J). When loss occurs, the insured shall: (a) protect the aircraft, provided the insured is able to do so, whether or not the loss is covered by this policy and any further loss due to the insured's failure to protect shall not be recoverable under this policy; however, where the loss or damage suffered constitutes a claim under this policy then all reasonable expense incurred in affording such protection shall be deemed a loss under this policy; (b) give notice thereof as soon as practicable to the company or any of its authorized agents and also, in event of theft, larceny, robbery or pilferage, to the police but shall not, except at his own cost, offer or pay any reward for recovery of the aircraft (c) file proof of loss with the company within sixty days after loss, unless such time is extended in writing by the company, in the form of a sworn statement of the insured setting forth the interest of the insured and of all others in the property affected, any encumbrances thereon, the actual cash value hereof at time of loss, the amount, place, time and cause of such loss, and the description and amounts of all other insurance covering such property.

Upon the company's request, the insured shall exhibit the damaged property to the company and submit to examination under oath by anyone designated by the company, subscribe the same and produce for the company's examination all pertinent records and sales invoices, or certified copies if originals be lost, permitting copies thereof to be made, all at such reasonable times and places as the company shall designate.

Coverage B — Property Damage [illegible] property of others.

Coverage C — Passenger [illegible]

Coverage D — Single Limit [illegible] property damage.

Coverage E — Single Limit [illegible] passenger caused by an [illegible] the aircraft.

Coverage F — Medical Coverage [illegible] one year from the [illegible]

amendment, or other crew member of the aircraft, unless "crew" is expressly specified as included in the Declarations.

Hull Coverages — To pay for direct loss of or damage to the aircraft, subject to the exclusions, conditions and other terms of this policy when caused by:

Coverage G — All Risks of Physical Loss or Damage to the Aircraft. The aircraft shall be presumed lost in flight if it disappears after take-off and is not located nor its whereabouts reported within sixty days thereafter.

Coverage H — All Risks of physical loss or damage to the aircraft while not in motion.

Coverage I — All Risks of physical loss or damage to the aircraft while not in flight.

Coverage J — As endorsed hereon.

11. Limit of Liability; No Abandonment (Coverages G, H, I and J). The limit of the company's liability for loss shall not exceed the actual cash value of the aircraft at the time of loss nor what it would then cost to repair or replace the aircraft or parts thereof with other of like kind and quality nor shall it exceed: (a) in the case of a total loss, the amount of insurance on any aircraft the subject of a claim; (b) in the case of partial loss when repairs are made by the insured, the actual cost of any parts or materials necessary to effect repairs or replacement plus 150% of the actual cost to the insured of labor exclusive of overtime labor and overhead; when the repairs are made by other than the insured, the actual costs as evidenced by bills rendered to the insured less any discount granted to the insured, excluding cost of overtime unless previously agreed to by the company. In no event shall the liability of the company for partial loss exceed the amount for which the company would be liable were the loss payable as a total loss.

In the event of either a total loss or a partial loss, there can be no abandonment of any property to the company however, any salvage remaining shall inure to the benefit of the company.

12. Deductible (Coverages G, H, I and J). The amount of the deductible specified in the declarations shall be deducted from the amount otherwise payable under this policy.

The "In Motion Deductible" as stated in the Declarations shall apply to each loss occurring while the aircraft is in motion.

The "Not in Motion Deductible" as stated in the Declarations shall apply to each loss occurring while the aircraft is not in motion, except no deductible shall apply to any such loss caused by fire, explosion, lightning, theft, except theft of or pilferage of an aircraft not regularly hangared at its home airport, or an accident to the conveyance in or on which the aircraft while dismantled is being transported.

13. Appraisal (Coverages G, H, I and J). If the insured and the company fail to agree as to the amount of loss, each shall, on the written demand of either, made within sixty days after receipt of proof of loss by the company, select a competent and disinterested appraiser, and the appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen days to agree upon such umpire, then, on the request of the insured or the company, such umpire shall be selected by a judge of a court of record in the county and state in which such appraisal is pending. The appraisers shall then appraise the loss, stating separately the actual cash value at the time of loss and the amount of loss, and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The insured and the company shall each pay his or its chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

The company shall not be held to have waived any of its rights by any act relating to appraisal.

14. Cost of Transportation (Coverages G, H, I and J). The cost of transporting new or damaged parts or of transporting the damaged aircraft to the place of repair and return to place of accident, or home airport, whichever be the nearer, shall be limited to the least expensive method of reasonable transportation.

In case of loss arising outside the continental limits of the United States of America, the limit of the company's liability for salvaging the aircraft including the transportation thereof and/or the transportation of new or damaged parts to the place of repair and return to the place of accident or home airport, whichever be the nearer, shall be limited to the least expensive methods of reasonable transportation and in no event shall exceed 15% of the claim otherwise payable.

15. Automatic Reinstatement (Coverages G, H, I and J). In the event of loss, whether or not covered by this policy, the amount of insurance in respect to any aircraft shall be reduced as of the time and date of loss by the amount of such loss and such reduced value shall continue until repairs are commenced when the amount of insurance shall automatically be increased by the value of the completed repairs until the Amount of Insurance is fully reinstated or the policy has expired.

16. Subrogation. In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights.

17. Changes. No notice to any agent or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy nor estop the company from asserting any right under the terms of this policy, nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part hereof signed by a duly authorized official of the company.

18. Assignment. No assignment of interest under this policy shall bind the company until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless cancelled, shall, if written notice be given to the company within thirty days after the date of such death or adjudication, cover any person having proper temporary custody of the aircraft or the named insured's legal representatives as the named insured.

19. Cancellation. This policy may be cancelled by the named insured by mailing written notice to the company, stating when thereafter such cancellation shall be effective. This policy may be cancelled by the company by mailing written notice to the named insured at the address shown in this policy stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the insurance under this policy shall end on the effective date and hour of cancellation stated in the notice. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing. If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected, and, if not then made shall be made as soon as practicable after cancellation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be sufficient tender of any refund of premium due to the named insured. The company shall not be liable for any return premium in respect to an aircraft on which a total loss has been paid.

20. Fraud or Misrepresentation. This policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof or in case of any fraud, attempted fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

21. Terms of Policy Conformed to Statute. Terms of this policy which are in conflict with the statutes of the state or province (Canada) wherein this policy is issued are hereby amended to conform to such statutes.

It is agreed that in the event of the failure of the Company to pay any amount claimed to be due hereunder, the Company, at the request of the insured, will submit to the jurisdiction of any court of competent jurisdiction within the United States or Canada and will comply with all matters arising hereunder as shall be determined in accordance with the law and practice of such court.

Should the named insured desire to institute suit against the Company in connection with such insurance as is afforded by this policy, the Company will, upon being so advised, appoint a person upon whom process may be served in the named insured's state or province provided there is not already an official so designated, and will also furnish the named insured with the name and address of such person.

22. Declarations. By acceptance of this policy the insured agrees that the statements in the application and declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

IN WITNESS WHEREOF, the company has executed and attested these presents, but this policy shall not be valid unless countersigned by a duly authorized agent of the company.

AMERICAN HOME ASSURANCE COMPANY

Max Wellmer
Secretary

Thomas R. Sewell
President

KANSAS AMENDMENT — In compliance with the laws of Kansas if this policy is issued or delivered in the State of Kansas: (a) Condition 6—Action against Company—is amended to provide that the time limit for commencing suit or action shall be five years rather than twelve months as stipulated therein. (b) Condition 13—Subrogation—shall not apply with respect to payment of any claim under Coverage F—Medical Payments.

MICHIGAN—AMENDMENT OF CANCELLATION CONDITION—If this policy is issued or delivered in the State of Michigan it is agreed that the first four sentences of the Cancellation Condition, paragraph 19, are amended to read as follows:

This policy may be cancelled by the insured named in Item 1 of the declarations by surrender thereof to the company or any of its authorized agents or by mailing to the company written notice stating when thereafter the cancellation shall be effective. This policy may be cancelled by the company by mailing to the insured named in Item 1 of the declarations at his address last known to the company or its authorized agent written notice stating when not less than ten days thereafter such cancellation shall be effective. The time of the surrender or the effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by such insured or by the company shall be equivalent to mailing.

WISCONSIN STATUTORY AMENDMENT—In compliance with the laws of the State of Wisconsin, Paragraph 3 of the EXCLUSIONS is deleted and the following substituted in lieu thereof:

3. While with the knowledge and consent of the insured
   (a) The aircraft is being used for any unlawful purpose; or
   (b) The aircraft is being used for closed course racing, spraying, or dusting, seeding, fish stocking, or any form of hunting or acrobatics or on altitude of less than 1,000 feet, unless this policy is specifically endorsed to include such use.

No. 1 Rev 7/71

(Caption omitted in printing)

Filed: Feb. 15, 1974

MOTION TO DISMISS THE AMENDED COMPLAINT

Now comes DEKALB COUNTY, GEORGIA, one of the Defendants in the above styled action, and moves the Court, pursuant to Rule 12, Federal Rules of Civil Procedure, for the dismissal of the amended Complaint, showing the Court as follows:

1.

The amended Complaint fails to state a claim or cause of action against DeKalb County, Georgia, upon which relief can be granted.

2.

None of the claims asserted against Defendant, DeKalb County, Georgia, can be granted owing to its constitutional governmental immunity which has not been waived, either expressly or impliedly.

[249] 3.

More particularly, DeKalb County, Georgia, shows the Court that the amended Complaint fails to state a claim upon which relief can be granted in the following respects:

(a) In Georgia, no direct action lies against the insurer of one of the Defendants;

(b) Plaintiffs cannot recover against DeKalb County, Georgia, on a theory of negligence as a matter of law owing to said Defendant's constitutional governmental

immunity from suit which has not been waived, either expressly or impliedly;

(c) The statutes, ordinances, and regulations recited in the amended Complaint do not create in Plaintiffs a cause of action against this Defendant;

(d) DeKalb County, Georgia, maintains the DeKalb-Peachtree Airport as a governmental function and, as such, is constitutionally immune from suit by these Plaintiffs.

WHEREFORE, Defendant, DeKalb County, Georgia prays that its Motion be inquired into and sustained and that the amended Complaint be dismissed as to it.

(Signature and Certificate of Service omitted in printing)

[251]

(Caption omitted in printing)

Filed: Feb. 15, 1974

MOTION TO STRIKE ALLEGATIONS FROM THE AMENDED COMPLAINT

Now comes DeKalb County, Georgia, one of the Defendants in the above styled action, and moves the Court, pursuant to Rule 12, Federal Rules of Civil Procedure, to strike certain allegations from the amended Complaint, showing the Court as follows:

1.

Defendant moves to strike Paragraphs 1 (e), 34, and 55 (b) from the Plaintiffs' amended Complaint on the ground that said Paragraphs fail to state a claim upon which relief can be granted in that in Georgia, no direct action lies against the insurer of one of the Defendants.

2.

Defendant moves to strike Paragraphs 51 and 52 from Plaintiffs' amended Complaint on the ground that said Paragraphs fail to state a claim upon which relief can be granted in that the statutes, ordinances, and regulations recited in said Paragraphs do not create in Plaintiffs a cause of action against this Defendant.

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3.

Defendant moves to strike Paragraphs 53, 54, the remaining allegations of 55, and 56 from the Plaintiffs' amended Complaint on the ground that said Paragraphs fail to state a claim upon which relief can be granted in that a County in Georgia is not subject to suit based upon

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negligence owing to its constitutional governmental immunity which has not been waived, either expressly or impliedly.

WHEREFORE, Defendant, DeKalb County, Georgia, prays that its Motion be inquired into and sustained.

(Signature and Certificate of Service omitted in printing)

(Caption omitted in printing)

Filed: Feb. 15, 1974

ANSWER OF DEKALB COUNTY, GEORGIA TO FIRST AMENDED COMPLAINT OF PLAINTIFFS

Comes now DeKalb County, Georgia and responds to the first amendment to Complaint of Plaintiffs as follows:

1.

DeKalb County, Georgia is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Subparagraph (e) of Paragraph 4 of the Complaint of Plaintiffs as amended.

2.

Responding to Paragraph 34 of the Complaint of Plaintiffs as amended, DeKalb County, Georgia admits that American Home Assurance Company issued a policy of liability insurance to DeKalb County, Georgia and further avers that the terms, limitations and conditions of said policy of insurance are contained in Exhibit "B" of the Complaint of Plaintiffs as amended. Further responding, these Defendants aver that any policy of insurance purchased by DeKalb County is a matter that concerns only DeKalb County and the American Home Assurance Company and any "waiver of governmental immunity" language contained in said policy of insurance does not in anywise prevent DeKalb County, Georgia from [237] raising the question of the immunity of the County to suit.

3.

DeKalb County, Georgia admits the allegations contained in Paragraphs 35, 36, 37, 38, 39, 40, 41, 42, 43 and 44 of the Complaint of Plaintiffs as amended.

4.

DeKalb County, Georgia is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 45, 46, 47, 48, 49, and 50 of the Complaint of Plaintiffs as amended.

5.

DeKalb County, Georgia denies the allegations contained in Paragraphs 52, 53, 54, 56, and 57 of the Complaint of Plaintiffs as amended.

6.

DeKalb County, Georgia responds to Paragraph 51 of the Complaint of Plaintiffs as amended as follows:

(a) Georgia Code Section 11-402 contains the following definition:

> "(2) "Airport Hazard" means any overhead power line which interferes with radio communication between the publicly-owned aircraft approaching or leaving same, or any structure or tree which obstructs the aerial approaches of such an airport or is otherwise hazardous to its use for landing or taking off."

The above definition is contained in the "Airport Zoning Act".

(b) DeKalb County, Georgia admits the "Airport Zoning Act" contains language that an airport hazard endangers the lives and property of users of the airport and is therefore not in the interest of the public health,

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public safety or general welfare. Responding further, Georgia Code Section 11-403 refers to "Airport Hazard" as defined in the "Airport Zoning Act".

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(c) DeKalb County, Georgia admits Subparagraph (c) and admits Georgia Code Section 11-9902 declares that the violation of an airport zoning regulation as set out in Chapter 11-4 of the Code of Georgia, shall constitute a misdemeanor.

(d) These Defendants aver the Airport Zoning Resolution defines "Airport Hazard" as follows:

"*Section 2. Definitions.* (2) "Airport Hazard" means any structure or tree or use of land which obstructs the air space required for the flight of aircraft in landing or taking off at the airport or is otherwise hazardous to such landing or taking off of aircraft."

(e) DeKalb County denies the allegations contained in Subparagraph (e) of Paragraph 51 of the amended Complaint.

(f) DeKalb County, Georgia denies the allegations contained in Subparagraph (f) of Paragraph 51 of the Complaint as amended.

(g) DeKalb County, Georgia, denies the allegations contained in Subparagraph (g) of Paragraph 51 of the Complaint of Plaintiffs as amended.

(h) DeKalb County, Georgia denies the allegations contained in Subparagraph (h) of Paragraph 51 of the Complaint as amended.

Further responding to Paragraph 51 of the Complaint as amended, DeKalb County, Georgia avers that it is not required by law to zone land for use by the County when that land is owned by the County.

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7.

DeKalb County responds to Paragraph 55 of the Complaint of Plaintiffs as amended as follows:

(a) The allegations contained in Subparagraph (a) are denied.

(b) Responding to Subparagraph (b), DeKalb County admits the policy of insurance was issued by American Home Assurance Company to DeKalb County and the terms, limitations and conditions thereof are contained within the policy attached to the Complaint of [239] Plaintiffs as amended.

(c) The allegations contained in Subparagraph (c) of Paragraph 55 are denied.

WHEREFORE, Having fully answered, the Complaint of Plaintiffs as amended, DeKalb County, Georgia prays it be hence discharged without liability and demands trial by jury.

(Signature and Certificate of Service omitted in printing)

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(Caption omitted in printing)

Filed: Apr. 24, 1974

PLAINTIFFS' SECOND AMENDMENT TO COMPLAINT

Plaintiffs amend their Complaint heretofore filed in said case by adding a new paragraph to be numbered 30(a) and to read as follows:

"30(a).

Defendants DEKALB COUNTY, GEORGIA, and COUNTY COMMISSIONERS, their predecessors in office, and their agents, servants and employees, were guilty of maintaining a nuisance which proximately contributed to the deaths of RICHARDSON F. MIREE and LUCY ESTES MIREE as follows:

(a) In maintaining a garbage dump on which was dumped untreated garbage, trash, refuse, offal, filth and other waste materials on DeKalb-Peachtree Airport property;

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(b) In intentionally and wantonly continuing to utilize airport property for a garbage dump after receiving notice of the bird hazard.

(Signature omitted in printing)

[318]

(Caption omitted in printing)

[317] Filed: May 14, 1974

ANSWER OF DEKALB COUNTY, GEORGIA TO SECOND AMENDED COMPLAINT OF PLAINTIFFS

Now comes DeKalb County, Georgia, and responds to the second amendment to the Complaint of Plaintiff as follows:

1.

Responding to Paragraph 30 (a) of the Complaint of Plaintiffs, this Defendant denies each and every allegation contained within the introductory paragraph designated 30 (a) of the Complaint of Plaintiffs.

2.

Responding to Subparagraph (a) of Paragraph 30 (a) of the Complaint of Plaintiffs, this Defendant admits that it maintained a sanitary landfill on the property contiguous with the DeKalb-Peachtree Airport. Responding further, this Defendant denies each and every remaining allegation contained within Subparagraph (a) of Paragraph 30 (a) of the Complaint of Plaintiffs.

[318]

Responding to Subparagraph (b) of Paragraph 30 (a) of the Complaint of Plaintiffs, this Defendant denies each and every allegation contained within Subparagraph (b) of Paragraph 30 (a) of the Complaint of Plaintiffs.

WHEREFORE, having fully answered the Complaint of Plaintiffs as amended, DeKalb County, Georgia, prays

[318]

it be hence discharged without liability and demands trial by Jury.

(Signature and Certificate of Service omitted in printing)

[321]

(Caption omitted in printing)

[320] Filed: May 14, 1974

MOTION TO DISMISS AND/OR MOTION TO STRIKE ALLEGATIONS FROM THE SECOND AMENDED COMPLAINT OF PLAINTIFFS

Now comes DeKalb County, Georgia, one of the Defendants in the above-styled action, and moves the Court, pursuant to Rule 12, Federal Rules of Civil Procedure, to dismiss and/or to strike the allegations contained within the second amended Complaint of Plaintiffs, showing the Court as follows:

1.

Defendant moves to dismiss and/or strike Paragraph 30 (a), and the Subparagraphs contained therein, from Plaintiffs' Complaint on the ground that said Paragraphs fail to state a claim upon which relief can be granted in that in Georgia, an action will not lie against a County for the alleged creation and/or maintenance of a nuisance.

WHEREFORE, Defendant DeKalb County, Georgia prays that [321] this Motion to Dismiss and/or Strike be inquired into and sustained.

(Signature and Certificate of Service omitted in printing)

[Filed in Clerk's Office, July 3, 1974,
Ben H. Carter, Clerk; By: P.J.E., Deputy Clerk.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGE HENSON MIREE, *et al.*,
Plaintiffs,
v.
UNITED STATES OF AMERICA, *et al.*,
Defendants.
} CIVIL ACTION NO. 19293

—AND—

JUDITH ANITA PHILLIPS,
Plaintiff,
v.
UNITED STATES OF AMERICA, *et al.*,
Defendants.
} CIVIL ACTION NO. 19412

—AND—

FIREMAN'S FUND INSURANCE COMPANY,
Plaintiff,
v.
UNITED STATES OF AMERICA, *et al.*,
Defendants.
} CIVIL ACTION NO. C-74-24-A

—AND—

WILLIAM MICHAEL FIELDS,
Plaintiff,
v.
DEKALB COUNTY, GEORGIA, *et al.*,
Defendants.
} CIVIL ACTION NO. C-74-291-A

—AND—

MRS. PEARLIE CHAISSON,
Plaintiff,
v.
SOUTHEAST MACHINERY, INC.,
Defendant.
} CIVIL ACTION NO. C-74-915-A

MOTION OF SOUTHEAST MACHINERY, INC., MACHINERY BUYERS CORP. AND FIREMAN'S FUND INSURANCE COMPANY TO VACATE, SET ASIDE, ALTER AND AMEND THE ORDERS ENTERED ON JUNE 27, 1974, AND FOR RECONSIDERATION, REHEARING AND NEW TRIAL

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[344]

FOREWORD

Inasmuch as all five of the above-entitled cases involve common questions of law and fact and inasmuch as all five of the June 27, 1974 orders entered by the Court in these cases are in pertinent part substantially identical, Southeast Machinery, Inc. and Machinery Buyers Corp. and Fireman's Fund Insurance Company (hereinafter

sometimes referred to simply as "movants") are filing this single motion in each of these cases. (Duplicate originals of this motion are being filed separately in each case, so that the dockets and records of the Court will be complete.)

THE MOTIONS

Come now movants and respectfully move the Court as follows:

(1) In Civil Action No. C-74-24-A, and pursuant to Rules 59 and 60, F.R.C.P., Fireman's Fund Insurance Company hereby respectfully moves the Court to vacate, set aside, amend and alter that portion of the June 27, 1974 order entered in said case which upheld DeKalb County's sovereign immunity defense, and which granted and sustained DeKalb County's motion to dismiss it as a defendant, and which dismissed DeKalb County and the DeKalb County Commissioners as defendants, and Fireman's Fund Insurance Company further hereby moves the Court to enter a new order in said case overruling and denying the motion to dismiss of DeKalb County and the DeKalb County Commissioners.

(2) In Civil Action No. C-74-24-A, and pursuant to Rules 59 and 60, F.R.C.P., Fireman's Fund Insurance Company hereby respectfully moves the Court for reconsideration, rehearing and new trial both with respect to the motion to dismiss of DeKalb County and the DeKalb County Commissioners and with respect to the June 27, 1974 order granting the motion to dismiss of DeKalb [345] County and the DeKalb County Commissioners, and after reconsideration, rehearing and new trial, to enter a new order in said case overruling and denying the motion to dismiss of DeKalb County and the DeKalb County Commissioners.

(3) In Civil Action No. C-74-915-A, and pursuant to Rules 59 and 60, F.R.C.P., Southeast Machinery, Inc. hereby respectfully moves the Court to vacate, set aside, amend and alter the June 27, 1974 order entered in said case, which order upheld DeKalb County's sovereign immunity defense, and which order granted and sustained DeKalb County's motion to dismiss, and which order dismissed DeKalb County and the DeKalb County Commissioners as third-party defendants, and Southeast Machinery, Inc. further hereby moves the Court to enter a new order in said case overruling and denying the motion to dismiss of DeKalb County and the DeKalb County Commissioners.

(4) In Civil Action No. C-74-915-A, and pursuant to Rules 59 and 60, F.R.C.P., Southeast Machinery, Inc. hereby respectfully moves the Court for reconsideration, rehearing and new trial both with respect to the motion to dismiss of DeKalb County and the DeKalb County Commissioners and with respect to the June 27, 1974 order entered in said case granting and sustaining the motion to dismiss of DeKalb County and the DeKalb County Commissioners, and after reconsideration, rehearing and new trial, to enter a new order in said case overruling and denying the motion to dismiss of DeKalb County and the DeKalb County Commissioners.

(5) In Civil Action Nos. 19293, 19412 and C-74-291-A, and pursuant to Rules 59 and 60, F.R.C.P., Southeast Machinery, Inc. and Machinery Buyers Corp. hereby respectfully move the Court to vacate, set aside, alter and amend the orders entered on June 27, 1974 in said cases, which orders granted and sustained the motions to dismiss of DeKalb County and the DeKalb County Commissioners, and said movants further hereby move the Court for reconsideration, rehearing and new trial both with respect to said June 27, 1974 orders and with respect to the motions to [346] dismiss of DeKalb

County and the DeKalb County Commissioners, and after reconsideration, rehearing and new trial, to enter new orders overruling and denying the motions to dismiss of DeKalb County and the DeKalb County Commissioners.

(6) In the alternative, and pursuant to 28 U.S.C. §1292(b) and Rules 59 and 60, F.R.C.P., movants hereby respectfully move the Court to enter orders in each of these cases altering, amending and modifying the June 27, 1974 orders entered in each of these cases, so as to provide with respect to the orders granting the motions to dismiss of DeKalb County and the DeKalb County Commissioners that there is a substantial ground for difference of opinion and that an immediate appeal from such orders may materially advance the ultimate termination of the litigation, or so as otherwise to provide the affected parties with the right to an immediate appeal from the orders dismissing DeKalb County and the DeKalb County Commissioners as defendants (particularly with respect to the dismissal orders in Civil Action Nos. C-74-24-A and C-74-915-A).

THE GROUNDS

As grounds for these motions, movants respectfully show:

(a) That the said June 27 dismissal orders are erroneous and incorrect as a matter of law, as is set forth more fully in the brief filed concurrently with these motions;

(b) That in reaching its erroneous decisions concerning sovereign immunity the Court overlooked controlling principles of law and misapplied the law of Georgia, as is set forth more fully in the brief filed concurrently herewith; and

(c) Alternatively, that the interests of efficient ad-

ministration of justice would be best served by providing the affected parties with the right to an immediate appeal from the [347] June 27 dismissal orders, as is set forth more fully in the brief filed concurrently herewith.

WHEREFORE, movants respectfully pray that these motions be inquired into and that the relief requested be granted in each of these cases.

Respectfully submitted,

/s/ J. ARTHUR MOZLEY

J. ARTHUR MOZLEY
Attorney for Movants

OF COUNSEL:

SMITH, COHEN, RINGEL, KOHLER,
MARTIN & LOWE
2400 First National Bank Tower
Atlanta, Georgia 30303

658-1200

(Certificate of Service omitted in printing)

PART B
APPENDIX
IN
No. 76-659

JUDITH ANITA PHILLIPS, *et al.*,
Petitioners,

v.

DEKALB COUNTY, GEORGIA, *et al.*,
Respondents.

CIVIL DOCKET

UNITED STATES DISTRICT COURT

D. C. Form No. 104 Rev.

Jury demand date:
By Plff: 11-28-73 & DeKalb Co. 1-21-74
By 3rd. pty. deft. 5-15-74

TITLE OF CASE	ATTORNEYS
JUDITH ANITA PHILLIPS, widow of David Emanuel Phillips, deceased -vs- UNITED STATES OF AMERICA -and- (6/27/74) DeKALB COUNTY, GEORGIA " [illegible]	For plaintiff: A. Russell Blank Egan & [illegible] 2417 First National Bank Tower Atlanta, Georgia 30303 (658-9070)
	For defendant: Harvey, Willard & Elliott Wendell K. Willard 125 Trinity Place Decatur, Georgia and Long, Weinberg, Ansley & Wheeler Meade Burns & F. Clay Bush 3000 The Equitable Bldg. Atlanta, Ga. 30303 (522-5303) (for DeKalb County)
	John W. Stokes, Jr. U.S. Atty. William D. Mallard, Jr. George H. Fleming U.S. Dept. of Justice Washington, D.C. 20530 202 739-46[illegible]

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed 11-28-73	Clerk	15 00				
J.S. 6 mailed	Marshal B/0774	13 20				
Basis of Action: Wrongful death of husband due to crash of aircraft.	Docket fee					
Action arose at:	Witness fees					
	Depositions					

BEST COPY AVAILABLE

UNITED STATES OF AMERICA and DEKALB COUNTY, GEORGIA — SHEET #2 — C.A. 1911

D. C. 110A Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Ord.

ADDITIONAL COUNSEL

George M. Fleming
Torts Section
Civil Division
U. S. Department of Justice
902 Safeway Building
Washington, D. C. 20530
For: United States

[illegible] H. Willard
Harvey, Willard & Elliott
125 Trinity Place
Decatur, Georgia (377-3051)
and
Long, Weinberg, Ansley & Wheeler
3000 The Equitable Building
Atlanta, Georgia 30302 (525-5903)
(for DeKalb County, Georgia)

J. Arthur Mozley
Smith, Cohen, Ringel, Kohler
Martin & Lowe
2400 First National Bank Tower
Atlanta, Georgia 30303
658-1200
5- -75 -Machinery Movers Corp.; and
Southeast Machinery, Inc.

[illegible] Forrest Hunter
Suite 2424, National Bank of Georgia Bldg.
Atlanta, Georgia 30303
577-1717 (for Machinery Movers Corp.)

JURY TRIAL DEMANDED

DATE 1973	PROCEEDINGS	Date Ord.
Nov. 28	Complaint, with JURY DEMAND, & Exh. A, filed. (Summons req.)	pl.
	Pltf's first request for admissions to deft. U. S. A., filed.	"
	Pltf's first request to produce to deft. U.S.A., filed.	"
	Pltf's first interrogs. to deft. U.S.A., filed.	"
	Pltf's first request for admissions to deft. DeKalb County, Georgia, filed.	"
	Pltf's first request to produce to deft. DeKalb County, Georgia, filed.	"
	Pltf's first interrogs. to deft. DeKalb County, Georgia, filed.	"
	$250.00 cost bond, filed.	"
29	Summons issued & delivered to U. S. Marshal. on all the above except the bond.	
DEC. 4	Marshal's return of service as to Gohl, Calloway, Coolidge, Morris, Smith, Ward, Williams & U. S. Attorney executed on 11-30-73, filed.	sat
5	Case reassigned to Judge O'Kelley	mjc
12	Consent ORDER ext. time thru 1/14/74 for deft. DeKalb County to ans., etc., filed. (Copies Furnished)	ajt
14 [illegible]		
[illegible]		
28	ANSWER of DeKalb County, Ga. with JURY DEMAND, filed.	
	Deft. DeKalb County's motion to strike, filed.	
	Deft. DeKalb County's motion to dismiss, filed.	
	Deft. DeKalb County's brief in support of above motions, filed.	
	Deft. DeKalb County's responses & objections to pltf's first interrogs. & motion for a protective order with brief, filed.	
	Deft. DeKalb County's responses & objections to pltf's requests for admissions & motion for a protective order with brief, filed.	mj
Feb. 5	Consent Order by Clerk extending time thru 2-5-74 for pltf. to file her reply to deft's motions to strike & dismiss, filed. C. furn.	
15	Deft. U.S.A.'s Motion to Consolidate w/brief and Proposed Order, filed.	a
	Deft. U.S.A.'s ANSWER, Crossclaim and Counterclaim, filed.	
	Deft. U.S.A.'s Answers to Pltfs' First Interrogs., filed.	
	Deft. U.S.A.'s Response to Pltfs' First Request for Admissions, filed.	
	Deft. U.S.A.'s Response to Pltfs' First Request to Produce, filed.	
	Deft. U.S.A.'s First Interrogs., to Pltf J.A. Phillips, filed.	"
19	Brief in opposition to deft., DeKalb County, Georgia's Motions to Strike and dismiss, filed.	
21	SUBMITTED ON DEFT. DEKALB COUNTY'S MOTION TO STRIKE AND MOTION TO DISMISS.	jc
25	Deft. U. S. A.'s memorandum in opposition to DeKalb's motion to dismiss to the cross-claim of the U. S. of America, filed.	"
26	Pltf's response to deft. U. S. of America's motion to consolidate, filed.	"
	SUBMITTED ON U.S.A. MOTION TO CONSOLIDATE.	"
27	ANSWER of Deft. DeKalb County to U.S.A.'s Cross-Claim, filed.	ajt
	Deft. Dekalb County's Amendment to the motion to dismiss and strike with attachments and brief in support, filed. To WCO	"
March 5	Notice of Appearance of George M. Fleming, Torts Section, Civil Division, U. S. Department of Justice, Washington, D. C. as additional counsel for deft USA, filed. To WCO	pld

SEE BACK OF SHEET # 2 for continuation

DATE 1974	PROCEEDINGS	Date Order
[illegible] 7	Pltf's reply to deft, United States of America's counterclaim, filed. WCO	
11	Pltf's amended reply to deft, U. S. Counterclaim, filed.	
	U. S.'s Motion for leave to file third-party complaint, exhibit attachments, filed.	
27	Pltf's answers to deft, United States of America's 1st. interrogs. filed.	
28	[illegible] U. S.A.'s MOTION FOR LEAVE TO FILE THIRD-PARTY COMPLAINT	
APRIL 2	Second interrogs propounded by the deft USA, to pltf., filed WCO	
	[illegible] DeKalb County, Georgia's 2nd supplemental brief, filed. To WCO	
12	Deft, USA, first request to prod. & permit inspection and copying addressed to pltf., filed. To WCO	
17	Pltf's supplemental brief in opposition to deft DeKalb County Georgia s motions to strike and dismiss, filed. To WCO	ple
May 1	Pltf's response to deft USA's first request to produce and permit inspection and copying of documents with attachments, filed.	
	Pltf's answers to deft USA's second interrogs., filed. To WCO	
	[illegible]	
22	ORDER filed - GRANTING U S's motion to consolidate case with C.A. 12293 for discovery purposes but deferring ruling on consolidation for trial purposes until the pretrial hearing; GRANTING U.S.'s motion to file a third-party complaint; GRANTING DeKalb Co's motion to strike portions of pltf's complaint; and GRANTING DeKalb Co's motion to dismiss pltf's complaint as to its claim of a citizen, reference to breach of contract, (copy to counsel, WCO) cross-claim of U. S. against DeKalb County still pending.	
3	Motion of Southeast Machinery, Inc., Machinery Buyers Corp. and Fireman's Fund Insurance Company to vacate, set aside, alter and amend the orders entered on June 27,1974 and for reconsideration, rehearing and new trial, with memo, filed.	
15	Response to pltf's 2nd request for admission addressed to deft. USA, filed.	
	[illegible]	
29	SUBMITTED ON DEFTS' SOUTHEAST MACHINERY, INC., MACHINERY BUYERS CORP., AND FIREMAN'S FUND INSURANCE CO'S MOTION TO VACATE, SET ASIDE, ALTER, AND AMEND THE ORDERS ENTERED 6/27/74 AND FOR RECONSIDERATION, REHEARING AND NEW TRIAL.	
31	Deft USA's request to produce and permit inspection and copying, filed. (ORIG & IMP REQ) IN 19293 WCO	
	Deft USA's 3rd interrogs. to the pltfs' Mines, filed. (In 19293) (orig-&-imp-req) WCO	
Aug. 1	Southeast Machinery, Inc., Machinery Buyers Corp. & Fireman's Fund Insurance Co's notice to take depositions, filed. WCO	
	[illegible]	
5	Deft. U.S.A.'s answers to pltf. Mines's 2nd. interrogs., filed. WCO	
	Marshal's return of service as to Southeast Machinery, Inc., executed 8/[illegible]/74; as to Machinery Buyers Corp., executed on 8/[illegible]/74, on 3rd party complaint, filed. WCO	

Cont'd.

D. C. 109A Rev. Civil Docket Continuation

DATE 1974	PROCEEDINGS	Date Order
JUL. 15	ANSWER of Machinery Buyers Corp. and Southeast Machinery, Inc. to Third-party complaint of United States of America, filed. WCO	
	Motions for summary judgment on behalf of third-party defts. Machinery Buyers Corp. and Southeast Machinery, Inc., brief, affidavit of William J. Fiala, Affidavit of Stanley E. Gavin, filed. WCO	
	JURY DEMAND of Third-party defts. Machinery Buyers Corp. and Southeast Machinery, Inc., filed.	
16	Pltf's Response To Motions To Consolidate of deft USA, filed. WCO	
19	Deft U.S.A.'s memorandum in support of the motion of Southeast Machinery, Inc., Machinery Buyers Corp., and Fireman's Fund Insurance Co. to vacate not set aside, alter and amend the orders entered 6/27/74, and for reconsideration, rehearing and new trial, filed. WCO	
20	Response of Machinery Buyers Corp., Southeast Machinery, Inc., & Fireman's Fund Insurance Co. to the request to produce and permit inspection and copying of the USA, filed. ~~(orig & imp req)~~ WCO	
21	Pltf's amended ANSWERS to deft, U.S.A's first interrogs and pltf's amended response to deft, USA's first request to produce, filed. WCO.	
27	United States' ANSWERS to the Mines' 2nd interrogs., filed. WCO	
Sept. 4	Deft's request forproduction of documents, filed. WCO	
10	Consent order ext. time for deft. and 3rd. pty. pltf. to respond to 3rd. party defts. motion for summary judgment thru Oct. 5, 1974 filed. c/c	
	[illegible]	
OCT. 7	SUBMITTED ON THIRD PARTY DEFTS MOTION FOR SUMMARY JUDGMENT	
8	Consent ORDER ext. time thru 10-18-74 for deft. & third-party pltf. to respond to third-party defts' motion for summary judgment, filed. (copies to counsel) To WCO	
10	Deposition of HENRY F. MANGET, JR. (Partial) filed. (IN 19293)	
16	Deft, U. S. A.'s Motion for Summary Judgment w/memorandum and exhibits, filed.	
18	Pltf's response to deft, United States of America's Request for Production of Documents, w/attachments, filed. (Copies requested) To WCO	
21	Consent Order by Clk. ext. time thru 12-02-74 for pltf. to respond to motion for partial summary, filed. (cf) To WCO	
22	Third-Party Defts, Machinery Buyers Corp & Southeast Machinery, Inc.'s Voluntary Withdrawal and Dismissal w/out prejudice of previously filed Motions for Summary Judgment (filed August 15, 1974), filed. To WCO	
23	Pltf's Notice of Appeal, filed. (Copy of notice to counsel and cert copy of notice and docket entries to USCA.) To WCO	
	Pltf's $250.00 Cost Bond on appeal, filed. To WCO	
Nov. 1	Pltf's Motion For [illegible] order to retain [illegible] certified copy USCA & copies Ord.) To WCO	
	Deft. U.S.A.'s Interrogs to defts Machinery Buyers Corp and Southeast Machinery Inc, filed. To WCO	
22	Certified copy of Order from USCA GRANTING leave to appeal from the interlocutory order of the DC entered on 10-[illegible]-74, filed. To WCO	

DATE 1975	PROCEEDINGS	Date Order or Judgment Note
Nov. 25	GRANTING copies of pleadings to the U.S.C.A. in lieu of the originals, filed. C. counsel. WCO	
26	Deposition of JOHN CZAR, filed. (In 19293)	vl
	REQUIRED PLAINTIFF TO APPEAR UNDER RULE FRAP. 2 cert. copies of docket sheet sent to plff's counsel.	
29	Plff's opposition brief to motion for partial summary judgment by Def., USA, filed. To WCO	
	ORDERED that Exhibit A., filed. To WCO	
DEC. 12	Plff's 2nd Request To Produce to deft U. S. A., filed. WCO	c.
1975		
JAN. 10	Deposition of WILLIAM JAYNE, taken by Deft., filed. (In 19293)	vl
	ORDER that Joan A. Russell Jurnk, Plff's Atty representation west Publishing records be forwarded to U.S.C.A., filed.	
	ORDER OF DISMISSAL WAIVED BY U.S.C.A. w/o Opn. Mdt Rule (7th)	
	D	
	Brief of Fireman's Fund Insurance Company, Southeast Machinery, Inc. and Machinery Buyers Corp. in opposition to motion for partial summary judgment filed by USA, filed. To WCO	pld
Feb. 4	Supplemental Brief of Fireman's Fund Ins. Co., Southeast Machinery Inc., and Machinery Buyers Corp. in Opposition to Motion for Partial Summary Judgment by USA., filed. To WCO	kg
27	Consent ORDER by WCO extending time through 3/17/75, for Deft. U. S. to respond to Plff's request for production, filed. (Copies to coun.) WCO	vb
Mar. 7	Defts. USA's Response to plff's Second Request to Produce, filed. To WCO.	nh
21	Deft' U.S.A.'s Supplemental Memorandum in Support of Motion for Partial Summary Judgment, with exhibit E, filed. To WCO	k
	Consent withdrawal & substitution of counsel with respect to certain 3rd party claims filed by Arthur Cooley and Judith, Conner, Hall, Kaiser & Ewell, be withdrawn & atty. for 3rd party defts. Southeast Machinery Corp. & M. Forest Nimmons entered in substitution as atty. of record, filed. ORD & ATTORNEY'S APPEARANCE made, filed. c.c.	
	ORDER DENYING the United States' motion for partial summary judgment, filed. c.c.	
27	Response of Local Properties, Inc. and Commerce and Industry Insurance Co. New York in Opposition to Motion for Partial Summary Judgment filed by U.S.A., filed.	
Apr.	Answer to cross-c., Inc., Machinery Buyers Corp., Southeast Machinery, Inc.'s Cross-c. of the United States of America & Third-party Complaint, filed.	
	Answer to Counterclaim, etc., of Machinery Buyers Corp., & Southeast Machinery, Inc.'s Brief in Support of Motion to Dismiss, filed.	
9	Plff's Motion to Dismiss with Brief, filed.	k
25	Deft. U. S.'s memo in opposition to Plff's motion to dismiss Deft's counterclaim, filed.	vb
29	SUBMITTED ON SEMAC INDUSTRIES, INC., MACHINERY BUYERS CORP., & SOUTHEAST MACHINERY INC.'S MOTION AND PLEA FOR STAY ON ACCOUNT OF PROCEEDINGS IN BANKRUPTCY COURT, AND ON PLTF'S MOTION TO DISMISS.	vl

DATE 1975	PROCEEDINGS	Date Order or Judgment Note
une 10	Order granting plff's motion to dismiss the counterclaim of the United States, filed. Copy to counsel 6-11-75	
	Order denying defts. Southeast Machinery, Inc., Machinery Buyers Corp., Inc. and Semac Industries, Inc.'s motion to stay on account of proceedings in bankruptcy, filed. Copy to counsel 6-11-75	mjw
29	Defts' Southeast Machinery, Inc., Machinery Buyers Corp., & Fireman's Fund Ins. Co.'s Notice To Continue Depositions, filed.	skb
8	Plff's Motion For Protective Order, with Brief, filed. (To WCO /file)	nao
10	Deft USA's motion for protective order, with mem., filed. (To WCO /file)	skb
15	Defts' Southeast Machinery, Inc., Machinery Buyers Corp. and Fireman's Fund amended notice to continue depositions, filed. WCO	pld
	ORDER	
16	Order that motions for protective order was disposed of by conf. with the attys for both sides on 9/11/75 and there is nothing further for the Court to decide, filed. Copy to counsel.	mjw
e. 12	Plff's motion to compel production of documents by deft. United States of America, with brief, filed.	ple
25	Response to motion to compel production of documents, filed.	dc
12	SUBMITTED TO WCO ON PLFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS BY DEFT UNITED STATES OF AMERICA.	nkb
12	Plffs' Notice of Taking Depositions of United States of America by and through Robert E. Harris, George C. Altman, Douglas B. Moore and Herbert H. Schaff, w/exhibit, filed. WCO	nh
8	Third-party deft, Machinery Buyers Corp's Motion for Summary Judgment as regards the third pty complaint of the United States of America insofar as said Third-party complaint is based upon the claim of Judith Anita Phillips for the death of David E. Phillips, w/attachments, filed. WCO	nh
13	Defts' Notice of Deposition of Mr. Thomas Watson, filed. WCO	pld
14	Plffs' notice to take deposition of deft USA, thru Thomas Watson, filed. WCO	"
	Plffs' notice to take deposition of deft USA, thru Stuart G. Williams and Donald Shreve, filed. WCO	"
	Motion for summary judgment of Southeast Machinery, Inc. as to the third-party complaint of the USA insofar as said third-party complaint seeks indemnity for the death of David E. Phillips, with brief, filed. WCO	"
4	SUBMITTED TO WCO ON 3RD PTY DEFT MACHINERY BUYERS CORP'S MOTION FOR SUMMARY JUDGMENT AS REGARDS THE 3RD PTY COMPLAINT OF U. S.	skb
	Plff Judith Anita Phillips' Withdrawal Of Motion, filed. WCO 2/6	skb
	Defts' Southeast Machinery, Inc., Machinery Buyers Corp., & Semac Industries, Inc., & Fireman's Fund Ins. Co.'s Response To Motion To Separate The Liability Issue For Trial, filed. (To WCO 2/6)	skb
5	Plff Judith Anita Phillips' Response To Motion To Separate The Liability Issue for Trial Of Deft USA, filed. WCO 2/6)	skb
	Supplemental Brief In Support Of Motion For Summary Judgment filed by Machinery Buyers Corp., against USA., filed. WCO 2/6	skb
6	Deft USA's Motion To Separate The Liability Issue For Trial, with Memorandum, filed. WCO 2/6)	skb
	Consent Order extending time through 2/24/76 for plff Marilyn Joyce Sellfors in C74-1069 to respond to Fed deft's Motion to Separate the Liability Issue for Trial, filed. (CF) WCO	nh
9	Consent Order by WCO ext. time thru 3/1/76, for USA to respond to motion for summary judgment of deft Machinery Buyers, Inc., filed. (Copy counsel 2/12) WCO	skb

DATE 1976	PROCEEDINGS	Date Judge
Feb. 12	Response of pltfs Howard, Draper and Nicholson in opposition to motion of deft USA to consolidate all actions for trial on the issue of liability, filed. WCO	p
Feb. 1[illegible]	Response of Pltf. WILLIAM MICHAEL FIELDS in opposition to motion of Deft. USA to consolidate all actions for trial on the issue of liability, filed. WCO	c
24	**Response of Pltf. Marilyn Joyce Sellfors in Opposition to Motion of Deft. USA to Separate the Liability Issue for Trial, filed.**	s
27	**SUBMITTED ON 3rd. Pty. Deft. Southeast Machinery, Inc's Motion For Summary Judgment, as to the 3rd. Pty Complaint of the USA insofar as said 3rd Pty. Complaint seeks indemnity FOR THE DEATH OF DAVID E. PHILLIPS.**	s
27	**SUBMITTED ON DEFT USA'S MOTION TO SEPARATE THE LIABILITY ISSUE FOR TRIAL.**	sc
March 3	**RESUBMITTED TO WCO ON 3rd. PTY. DEFT. MACHINERY BUYERS CORP'S MOTION FOR SUMMARY JUDGMENT AS REGARDS THE 3rd PTY. COMPLAINT OF U.S.**	sc
Mar. 22	[illegible]	
Mar 29	[illegible]	
Apr. 6	RESUBMITTED ON 3RD PTY DEFT MACHINERY BUYERS CORP.'S MOTION FOR SUMMARY JUDGMENT ETC. AND RESUBMITTED ON MOTION FOR SUMMARY JUDGMENT OF SOUTHEAST MACHINERY, INC.	plc
28	Motion for summary judgment of Southeast Machinery, Machinery Buyers and Semac with brief and affidavit of J. Arthur Moxley with attachments, filed. WCO	
	ORDER allowing the various amendments submitted by Machinery Buyers, Southeast Machinery and Semac with respect to their defensive pleadings, filed. (c.s. 4-28)	"
	Amendment of answer of Machinery Buyers and Southeast Machinery to the 3rd pty complaint of USA, filed. WCO	"
May 5	ORDER GRANTING Motion for Summary Judgment of Machinery Buyers' and GRANTING Motion for Summary Judgment of Southeast Machinery, Inc. and DENYING the United States' Motion requesting separation of the issue of liability from the issue of damages for purposes of trial and concluding that ruling on question of whether action is to be tried in a bifurcated manner await the pretrial conference, filed. (Copies to counsel 5/5/76)	mj
7	USA's memorandum in opposition to motion for summary judgment on behalf of Machinery Buyers as regards the third party complaint of the USA insofar as said third party complaint is based upon the claim of Judith Anita Phillips for the Death of David E. Phillips with exhibits, filed.	plc
	USA's memorandum in opposition to motion for summary judgment on behalf of Southeast Machinery as regards the 3rd pty complaint of USA insofar as said 3rd pty complaint seeks indemnity for the Death of David E. Phillips, filed.	"
12	First interrogs. of Fireman's Fund, Southeast Machinery, Machinery Buyers and Semac, Inc. to USA, filed.	
25	SUBMITTED ON MOTION FOR SUMMARY JUDGMENT OF SOUTHEAST MACHINERY, MACHINERY BUYERS AND SEMAC WITH RESPECT TO MAIN CLAIMS, THIRD PARTY CLAIMS, ET C.	"
June 2	USA's memorandum in opposition to motion for summary judgment of Southeast, Machinery Buyers and Semac, filed.	"
7	Supplemental brief of Southeast, Machinery Buyers and Semac in support of motion for summary judgment, filed.	"
	Statement of uncontested facts in support of motion for summary judgment, filed.	"

PLAINTIFF	DEFENDANT	DOCKET NO.
JUDITH ANITA PHILLISP, ET AL	USA, ET AL	PAGE 5 OF PAG

DATE 1976	NR.	PROCEEDINGS
June 9	pld	First interrogs. of Fireman's Fund, Southeast Machinery, Machinery Buyers and Semac to pltf Chaisson, filed. WCO
	"	First interrogs. of Fireman's Fund, Southeast Machinery, Machinery Buyers and Semac to The Mirce pltfs, filed. WCO
	"	First interrogs. of Fireman's Fund, Southeast Machinery, Machinery Buyers and Semac to pltf Fields, filed. WCO
	"	First interrogs. of Fireman's Fund, Southeast, Machinery Buyers and Semac to Dekalb County, Georgia, filed. WCO
	16 "	Memorandum of Pearlie Chaisson in opposition to motion for summary judgment of Southeast, Machinery Buyers and Semac, filed. WCO
July 12	"	Proposed consent order to ext. time thru 8-11-76 for pltf Wm. Fields to respond to first interrogs. of Fireman's, Southeast, Machinery Buyers and Semac, rec'd. WCO for approval
	13 "	Second supplemental brief of Southeast, Machinery Buyers and Semac in support motion for summary judgment, filed.WCO
	14 "	Machinery Buyers, Southeast, Semac and Fireman's first request for admissions directed to Dekalb County with exhibits, filed. WCO
	"	Consent ORDER ext. time thru 8-11-76 for pltf Wm. Fields to file answers, etc. to first interrogs. of Fireman's, Southeast, Machinery Buyers and Semac, filed. (cy counsel 7-15) WCO
Aug. 2	"	Machinery Buyers, Southeast, Semac and Fireman's second request for admissions directed to Dekalb County with exhibits, filed. WCO
	10 "	Consent ORDER ext. time thru 9-10-76 for pltf Wm. Michael Fields to file answers or objections to first interrogs. of Fireman's Fund, Southeast, Machinery Buyers and Semac, filed. (CF) WCO
	"	Dekalb County Georgia's motion for protective order with brief, filed. WCO
	"	Responses and Objections of Dekalb County, Georgia to first request for admiss of Machinary Buyers, Southeast, Semac and Fireman's Fund, filed. WCO
	18 dw	Answers to First Interrogs of Fireman's Fund Insurance Company, Southeast Machi Inc., Machinery Buyers Corp. and Semac Industries, Inc. to The United States of America, filed. WCO
	23 pld	Machinery Buyers, Southeast, Semac and Fireman's brief in support of their first request for admission directed to Dekalb County and in opposition to Dekalb Co motion for protective order, filed. WCO
	30 "	Dekalb County's motion for protective order with brief, filed. WCO'
	"	Dekalb County's response and objections to second request for admissions of Machinery Buyers, Southeast, Semac and Fireman's Fund, filed. WCO
	31 "	SUBMITTED DEKALB COUNTY GEORGIA'S MOTION FOR PROTECTIVE ORDER.
	"	Pltf Chaisson answers to first interrogs. of Fireman's Fund, Southeast, Machine Buyers and Semac, filed. WCO
Sept. 9	"	Machinery Buyers, Southeast, Semac and Fireman's brief in support of their second request for admission directed to Dekalb County and in opposition to Dekalb's motion for protective order, filed. WCO
	10 "	Proposed consent order to ext. time thru 10-10-76 for pltf Fields to respond to first interrogs. of Fireman's, Fund, Southeast, etc., rec'd. WCO for approval
	15 "	Consent ORDER ext. time thru 10-10-76 for pltf Fields to respond to first interrogs. of Fireman's Fund, Southeast, etc., filed. (cy counsel 9-17) WCO
	20 "	Certified copy of Judgment on rehearing en banc AFFIRMED by USCA and further ordered that pltf pay to deft and third party defts the costs on appeal to be taxed by the Fifth Circuit, filed.(with opinion) cy counsel 9-23)
	23 "	SUBMITTED ON DEKALB COUNTY GEORGIA'S MOTION FOR PROTECTIVE ORDER OF 9-30-76.
	mjw	Order DENYING motions for summary judgment of Southeast Machinery Semac Industries, Inc. and Machinery Buyers Corp., filed. Copy to counsel.

DC 1169 (Rev.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO ___ ____ PAGE ___ OF ___ PAGES

DATE 1976	NR.	PROCEEDINGS
Oct. 12	pld	ORDER granting Dekalb County's motions for protective order, filed. (cy counsel 10-14)
27	"	Letter from pltf's counsel requesting clerk to forward the record to the U. S. Supreme Court, filed.
Nov. 10	"	Copies of file that were sent on appeal 11-22-74 mailed to U.S.S.C. cert. mail (AC

(Caption omitted in printing) [6]

COMPLAINT

Filed: Nov. 28, 1973

Comes now JUDITH ANITA PHILLIPS, Plaintiff in the above entitled cause, and by way of Complaint shows the Court as follows:

COUNT ONE

1.

Plaintiff, JUDITH ANITA PHILLIPS, is a citizen of the State of Tennessee, residing at 1406 Monroe Street, Maryville, Blount County, Tennessee.

2.

This action is brought against the UNITED STATES OF AMERICA pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346(b). Plaintiff has exhausted her administrative remedies pursuant to 28 U.S.C. §2675 and this action is brought within the period specified by 28 U.S.C. §2401(a).

3.

The Defendant, DeKALB COUNTY, GEORGIA, is a political subdivision in the State of Georgia, and when the Chairman and each Member of the Board of Commissioners of Roads and Revenues of DeKalb County, Georgia, are served with a copy of the Complaint and Summons in this action, Defendant will be subject to the

[6]

jurisdiction of this Court, pursuant to 28 U.S.C. §1332. The Chairman and each Member of the Board of Commissioners of Roads and Revenues have been put on notice of the [7] existence of Plaintiff's claim. This matter exceeds $10,000.00, exclusive of interest and costs.

4.

On February 26, 1973, at approximately 10:15 a.m., E.S.T., Plaintiff's decedent was employed as a pilot aboard Aircraft Number N454RN, and at all times material hereto was performing his alternate duty of co-pilot aboard said aircraft, when, shortly after takeoff, said aircraft crashed approximately two miles south/southwest of the DeKalb-Peachtree Airport, killing all persons aboard, including Plaintiff's decedent.

5.

A short time after said crash, there were found the remains of many dead birds at and near the end of Runway 20L, from which the subject aircraft departed. There were also discovered to be thousands of birds swarming and flying over said airport and the adjacent garbage dump, which was being operated by Defendant, DeKALB COUNTY, GEORGIA.

6.

The aircraft here involved was Learjet, Model 24, a twin-engined turbine-powered jet aircraft manufactured by Gates Learjet Corporation, and the engines thereto affixed were Model CJ610-4 Turbine-powered Jet Engines manufactured by General Electric Company.

7.

At all times material hereto, the Defendant, UNITED

[8]

STATES OF AMERICA, by and through its duly constituted, qualified, and acting agency and authority, namely the Federal Aviation Administration, and Defendant, DeKALB COUNTY, GEORGIA, knew of the existing and pre-existing bird hazard at the DeKalb-Peachtree Airport, in that said bird hazard had existed for a substantial period of time, to wit, several years. Said Defendants further knew that the maintenance of an adjacent and immediately contiguous county garbage dump provided an attractive food supply and nesting place for thousands of birds which daily were attracted to and did avail themselves of [8] said food supply and nesting place at said county garbage dump and airport. There was thus created a substantial hazard to safe operations of departing and arriving jet turbine-powered aircraft, including the said aircraft in which Plaintiff's decedent lost his life as a result of the ingestion of a large number of birds into the engines, causing consequent loss of power by the engines on said aircraft.

8.

The Defendant, UNITED STATES OF AMERICA, through the Department of Transportation, Federal Aviation Administration, is guilty of negligence in at least the following particulars:

(a) In failing to perform the duty owed by the Administrator of the Federal Aviation Administration to establish and assure the safety of the design and manufacture of aircraft and in issuing certificates for the subject plane and its engines without in any way limiting or placing conditions upon their use in areas where birds are known to constitute a hazard to air navigation;

(b) In failing to perform the procedures already established whereby planes, especially jet aircraft, would not be cleared for takeoff where birds are a known hazard without checking to discover whether birds were, at the time of takeoff, of sufficient quantity to constitute a menace;

(c) In failing to issue a warning to the crew aboard the subject aircraft, comprising the pilot and co-pilot thereon, by control tower personnel, so as to properly and adequately apprise the pilot and co-pilot as to the probable danger then known, or which in the exercise of ordinary care should have been known, to the controller, who was at all times material hereto an employee of said Defendant through its authorized agency, the Federal Aviation Administration;

(d) Notwithstanding the knowledge of the Federal Aviation Administration as to the flight hazard posed by the presence of the county garbage dump and the birds attracted thereby for a substantial period of time [9] preceding the subject incident, the Defendant, through the Federal Aviation Administration agency, failed to alleviate and/or eliminate the severe flight hazard posed thereby.

9.

At all times material hereto, Defendant, DeKALB COUNTY, GEORGIA, was operating the DeKalb-Peachtree Airport in a proprietary and ministerial capacity, as distinguished from a governmental capacity, and in the performance of said ministerial or proprietary capacity, was negligent in at least the following particulars:

(a) In failing to provide, maintain, and operate an airport reasonably safe for the jet aircraft permitted to utilize the same;

(b) In failing to exercise ordinary care in the maintenance and operation of the DeKalb-Peachtree Airport and a county garbage dump located on said airport property, whereby the dump and the birds attracted thereby constituted an unreasonable hazard to jet aircraft departing a runway of said airport.

10.

At the time of his death, David Emanuel Phillips left surviving him his wife, Judith Anita Phillips, Plaintiff herein; and one minor child, his daughter, Michele Diana Phillips, 3 years of age. Plaintiff brings this action for the wrongful death of her decedent on her own behalf and on behalf of the minor child of the decedent, for the full value of the life of Plaintiff's decedent as will be shown by the evidence and as provided for and contemplated by the laws of the State of Georgia.

11.

At the time of his death, Plaintiff's husband was 28 years of age, and had a life expectancy of 46.52 years, according to the Annuity Mortality Table for 1949, Ultimate.

12.

At the time of his death, Plaintiff's husband was employed by Machinery Buyers Corporation, where he was earning in excess of $20,000.00 [10] per year. Plaintiff's decedent was an experienced and accomplished pilot, having satisfied the requirements for and having been awarded all licenses that one may achieve and obtain under authority of the Federal Aviation Administration, including the rating of "Airline Transport Pilot", which is the ultimate and highest rating obtainable. Plaintiff's

decedent husband amassed several thousand hours of flying experience as a pilot in all categories of licenses, and had great prospects for future increases in earning ability and capacity.

13.

The subject occurrence resulted from and was proximately caused by the joint, combined, and concurring negligence of the Defendants as aforesaid, for which Defendants are jointly and severally liable.

WHEREFORE, Plaintiff demands a trial by jury, and judgment against the Defendants, jointly and severally, in the sum of One Million Dollars ($1,000,000.00) and the costs of this action.

COUNT TWO

14.

The allegations of Paragraphs 1 through 12 are hereby adopted and incorporated by reference as if they were fully set forth herein.

15.

At all times herein pertinent, the Defendant, UNITED STATES OF AMERICA, through the Federal Aviation Administration, was required by statute to take adequate measures to insure that birds would not act as airport hazards to aircraft utilizing an airport funded wholly or in part through Federal appropriations. Airport and Airway Development Act of 1970, 49 U.S.C. §1701, et seq.

16.

At all times herein pertinent, and for several years prior to February 26, 1973, Defendant, UNITED STATES

OF AMERICA, through the Federal Aviation Administration, knew of the existence of a bird hazard at the [11] DeKalb-Peachtree Airport which made it unsafe to operate jet aircraft at the same.

17.

Despite this knowledge, as aforesaid, Defendant, UNITED STATES OF AMERICA, failed to perform the duties required of them, and as a result of the negligence of Defendant, the aircraft in which Plaintiff's decedent was employed as a pilot, but acting in his alternate capacity as co-pilot, was disabled through and because of the bird hazard, as aforesaid.

18.

The negligence of Defendant, UNITED STATES OF AMERICA, was the sole, direct and proximate cause of Plaintiff's decedent's death, for which defendant is liable.

WHEREFORE, Plaintiff demands a trial by jury, and judgment against Defendant, UNITED STATES OF AMERICA, in the sum of One Million Dollars ($1,000,000.00) and the costs of this action.

COUNT THREE

19.

The allegations of Paragraphs 1 through 12 are hereby adopted and incorporated by reference as if fully set forth herein.

20.

The Defendant, DeKALB COUNTY, GEORGIA, at all times herein pertinent, knew of the existence of a bird

hazard created by a county garbage dump owned and operated by Defendant.

21.

Despite numerous demands by Defendant, UNITED STATES OF AMERICA, to discontinue the operation and maintenance of said garbage dump adjacent to and contiguous with said airport. Defendant, DeKALB COUNTY, GEORGIA, continued the operation of said garbage dump, when it knew for a substantial period of time prior to the incident here concerned, to wit, several years, that the bird hazard did exist and would continue to exist.

[12]

22.

By operating a garbage dump adjacent to an airport, whereby aircraft might collide, and have collided, with birds attracted by said garbage dump, Defendant, DeKALB COUNTY, GEORGIA, is guilty of maintaining a public nuisance within the meaning of Georgia law, thereby causing special damage to Plaintiff, for which Plaintiff hereby makes demand.

23.

The nuisance as maintained by Defendant, DeKALB COUNTY, GEORGIA was the sole, direct, and proximate cause of Plaintiff's decedent's death, for which Defendant is liable.

WHEREFORE, Plaintiff demands a trial by jury and judgment against Defendant, DeKALB COUNTY, GEORGIA, in the sum of One Million Dollars ($1,000,000.00) and the costs of this action.

24.

The allegations of Paragraphs 1 through 12 are hereby adopted and incorporated by reference as if fully set forth herein.

25.

During 1960, and pursuant to the provisions of Public Law 289, DeKalb-Peachtree Airport, formerly a Naval Air Station, was returned as surplus military property to Defendant, DeKALB COUNTY, GEORGIA, for use as a civil airport.

26.

Since 1960, Defendant, UNITED STATES OF AMERICA, has entered into six (6) Federal Grants with Defendant, DeKALB COUNTY, GEORGIA, for the purpose of constructing and implementing airport improvements, including the construction of Runway 20L. An example of one such Agreement is appended hereto as Exhibit "A" and is incorporated herein by reference.

27.

Upon the approval of each Federal Grant for airport improvements, Defendant, DeKALB COUNTY, GEORGIA, gave certain Assurances, termed [13] "Sponsor's Assurances", including but not limited to the following:

> "The Sponsor will operate and maintain in a safe and serviceable condition the airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the airport other than facilities owned or controlled by the United States, and will not permit any activity

thereon which would interfere with its use for airport purposes."

* * *

"The Sponsor will not make or permit the making of any changes or alterations in the airport or any of its facilities other than in conformity with the airport layout plan as so approved by the FAA, if such changes or alterations might adversely affect the safety, utility or efficiency of the airport."

* * *

"Insofar as is within its power and to the extent reasonable, the Sponsor will take action to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft."

28.

Since June, 1962, Defendant, DeKALB COUNTY, GEORGIA, has received in excess of $1,025,224.06 pursuant to the six aforementioned Grant Agreements with the Federal Government.

29.

Contrary to the assurances given by DeKALB COUNTY, GEORGIA, for the receipt of said monies, and in direct contravention to the airport layout plan developed by DeKALB COUNTY, GEORGIA, and approved by the Federal Aviation Administration, Defendant, DeKALB COUNTY, GEORGIA, established, constructed, and maintained a garbage dump upon and adjacent to the DeKalb-Peachtree Airport, which garbage dump has at all times herein pertinent been incompatible with

normal and safe airport operations, including the landing and takeoff of jet aircraft, by reason of the fact that said garbage dump attracted birds in large numbers, which when ingested into engines of jet powered aircraft would damage said engines and cause a loss of power therein.

[14] 30.

The crash of Learjet N454RN and the loss of life of Plaintiff's decedent were caused by the ingestion of said birds into the engines of the subject aircraft.

31.

Defendant, DeKALB COUNTY, GEORGIA, has willfully violated the provisions of said Grant Agreements in establishing and permitting to exist said garbage dump, which assurances as given by DeKALB COUNTY, GEORGIA, were designed and intended to inure to the benefit of Plaintiff's decedent herein, as a third party beneficiary, and thus, Defendant, DeKALB COUNTY, GEORGIA, is liable to the Plaintiff for breach of contract.

WHEREFORE, Plaintiff demands a trial by jury and judgment against the Defendant, DeKALB COUNTY, GEORGIA, in the sum of One Million Dollars ($1,000,000.00) and the costs of this action.

ROSS & FINCH

/s/ CLAUDE R. ROSS

/s/ BAXTER H. FINCH

/s/ A. RUSSELL BLANK

Attorneys for Plaintiff

3417 First National Bank Tower
Atlanta, Georgia 30303

(404) 658-9070

(Exhibits to Complaint omitted in printing)

(Caption omitted in printing)

ANSWER OF DEKALB COUNTY, GEORGIA

Filed: Jan. 28, 1974

Comes now DeKalb County, Georgia, and responds to the Complaint of Plaintiff as follows:

FIRST DEFENSE

COUNT ONE

1.

This Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 1 and 2 of Count One of the Complaint of Plaintiff.

2.

Responding to Paragraph 3 of Count One of the Complaint of Plaintiff, this Defendant admits that DeKalb County, Georgia is a political subdivision of the State of Georgia. Responding further, this Defendant denies the remainder of the allegations contained in Paragraph 3 of Count One of the Complaint of Plaintiff.

3.

Responding to Paragraph 4 of Count One of the Complaint of Plaintiff, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that Plaintiff's decedent was performing his alternate duty of co-pilot aboard said aircraft at the time of the occurrence described. Responding further, the

remainder of the allegations contained in Paragraph 4 of Count One of the Complaint of Plaintiff are admitted by this Defendant.

[96]

4.

Responding to Paragraph 5 of Count One of the Complaint of Plaintiff, this Defendant admits that following the crash of the aircraft there were some dead birds at and near the end of Runway 20L. Further responding, the remainder of the allegations contained in Paragraph 5 of Count One of the Complaint of Plaintiff are denied by this Defendant.

5.

This Defendant admits the allegations contained in Paragraph 6 of Count One of the Complaint of Plaintiff.

[97]

6.

This Defendant denies the allegations contained in Paragraph 7 of Count One of the Complaint of Plaintiff.

7.

The allegations of Paragraph 8 of Count One of the Complaint of Plaintiff are directed to The United States of America and the response is not required of this Defendant.

8.

The allegations contained in Paragraph 9 of Complaint of Plaintiff, including subparagraphs (a) and (b) thereof, are denied by this Defendant.

9.

Responding to Paragraph 10 of Count One of the Com-

plaint of Plaintiff, this Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in respect of the survivors of decedent, David Emanuel Phillips. Responding further, this Defendant denies Plaintiff is entitled to recover of DeKalb County, Georgia any sum in damages for the wrongful death of David Emanuel Phillips.

10.

This Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 11 and 12 of Count One of the Complaint of Plaintiffs.

11.

The allegations contained in Paragraph 13 of Count One of the Complaint of Plaintiff are denied by this Defendant.

WHEREFORE, DeKalb County, Georgia demands a trial by jury and prays it be hence discharged without liability on Count One of the Complaint of Plaintiff.

COUNT TWO

12.

Count Two of the Complaint of Plaintiff is directed to The United States of America and fails to set forth a claim or cause of action against this Defendant upon which relief can be granted and this Defendant is not required to respond further to Count Two.

WHEREFORE, DeKalb County, Georgia prays it be hence discharged without liability on Count Two of the Complaint of Plaintiff.

COUNT THREE

13.

Plaintiff incorporates the allegations of Paragraphs 1 through 12 as Paragraph 19 of Count Three of the Complaint, and this Defendant likewise incorporates and adopts its responses to Paragraphs 1 through 12 of Count One of the Complaint of Plaintiff as its response to Paragraph 19 of Count Three of the Complaint.

14.

The allegations contained in Paragraph 20 of Count Three of the Complaint of Plaintiff are denied by this Defendant.

15.

Responding to Paragraph 21 of Count Three of the Complaint of Plaintiff, this Defendant admits that DeKalb County, Georgia had corresponded with, received correspondence from and had conferences with personnel of the Federal Aviation Administration in respect of the use and maintenance of [98] the landfill contiguous to the land utilized as an airport facility. Responding further, the remainder of the allegations contained in Paragraph 21 of Count Three of the Complaint of Plaintiff are denied.

16.

This Defendant denies the allegations contained in Paragraphs 22 and 23 of Count Three of the Complaint of Plaintiff.

WHEREFORE, DeKalb County, Georgia demands a trial by jury and prays it be hence discharged on Count Three of the Complaint of Plaintiff without liability.

COUNT FOUR

17.

Plaintiff incorporates the allegations of Paragraphs 1 through 12 as Paragraph 24 of Count Four of the Complaint, and this Defendant likewise incorporates its responses to Paragraphs 1 through 12 of Count One of the Complaint as its response to Paragraph 24 of Count Four as if fully set forth herein.

18.

The allegations contained in Paragraphs 25 and 26 of the Complaint of Plaintiff are admitted by this Defendant.

19.

Responding to Paragraph 27 of Count Four of the Complaint of Plaintiff, this Defendant avers that the contents, provisions and agreements of each Federal Grant Agreement speaks for itself and no further response is required of this Defendant.

20.

This Defendant admits the allegations contained in Paragraph 28 of Count Four of the Complaint of Plaintiff.

21.

This Defendant denies the allegations contained in Paragraph 29 of Count Four of the Complaint of Plaintiff.

22.

This Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 30 [99] of Count Four of the Complaint of Plaintiff.

23.

This Defendant denies the allegations contained in Paragraph 31 of Count Four of the Complaint of Plaintiff.

WHEREFORE, DeKalb County, Georgia demands a trial by jury and prays it be hence discharged without liability.

SECOND DEFENSE

Counts One, Two, Three and Four of the Complaint of Plaintiff fail to state a claim or cause of action against this Defendant upon which relief can be granted.

WHEREFORE, DeKalb County, Georgia demands a trial by jury and prays it be hence discharged without liability.

HARVEY, WILLARD & ELLIOTT
/s/ WENDELL K. WILLARD
WENDELL K. WILLARD

125 Trinity Place
Decatur, Georgia

LONG, WEINBERG, ANSLEY
& WHEELER
/s/ MEADE BURNS
MEADE BURNS
/s/ F. CLAY BUSH
F. CLAY BUSH
Attorneys for Defendant,
DeKalb County, Georgia

JURY TRIAL DEMANDED

3000 The Equitable Building
Atlanta, Georgia 30303
525-5903

(Caption omitted in printing)

MOTION TO DISMISS

Filed: Jan. 28, 1974

Now Comes DEKALB COUNTY, GEORGIA, one of the Defendants in the above-styled action, and moves the Court, pursuant to Rule 12, Fed. Rules of Civ. Proc., for the dismissal of the Complaint, showing the Court as follows:

1.

The Complaint fails to state a claim or cause of action against DeKalb County, Georgia, upon which relief can be granted.

2.

None of the claims asserted against Defendant, DeKalb County, Georgia, can be granted owing to its governmental immunity.

3.

More particularly, DeKalb County, Georgia, shows the Court that the Complaint fails to state a claim upon which relief can be granted in the following respects:

(a) In Georgia, no right of action will lie against a County for the creation and/or maintenance of a nuisance;

(b) There is no right of action in plaintiffs, as third-party beneficiaries, on any alleged breach of any Federal Grant Agreements entered into by and between DeKalb County, Georgia, and the Federal Aviation Administration because there is no intent made manifest within such Federal Grant Agreements to confer

[104]

upon third persons the type [105] of benefit claimed by Plaintiffs in this action;

(c) Even if the Federal Grant Agreements entered into by and between DeKalb County, Georgia and the Federal Aviation Administration were intended to benefit the public in the manner claimed by Plaintiffs, the Complaint shows on its face that these Federal Grant Agreements have not been breached by DeKalb County, Georgia, in operating a sanitary landfill on property contiguous to DeKalb-Peachtree Airport in that the Federal Aviation Administration is alleged to have had knowledge of and thus to have consented to and consciously allowed the maintenance of said landfill;

(d) Even if Plaintiffs otherwise had the right to sue as third-party beneficiaries for an alleged breach of the Federal Grant Agreements entered into by DeKalb County, Georgia, and the Federal Aviation Administration, Plaintiffs cannot recover damages for any alleged wrongful deaths stemming from the alleged breach because a third-party beneficiary's rights under any contract are no greater than the rights of the parties themselves, and the Federal Grant Agreements which Plaintiffs allege to have been breached confer no right on any party to recover damages for personal injury or wrongful death in the event of their breach;

(e) Plaintiffs cannot recover against DeKalb County, Georgia on a theory of negligence as a matter of law owing to said Defendant's governmental immunity from suit based on such a theory.

WHEREFORE, Defendant, DeKalb County, Georgia prays that its Motion be inquired into and sustained, and that the Complaint be dismissed as to it.

[106]

(Signature omitted in printing)

[222]

(Caption omitted in printing)

AMENDMENT TO THE MOTION
TO DISMISS AND STRIKE

[222] Filed: Feb. 27, 1974

Now comes DEKALB COUNTY, GEORGIA, one of the Defendants in the above-styled action, and amends its Motion to Dismiss and Motion to Strike, filed previously with the Court, as follows:

1.

Defendant relies upon the affidavit attached hereto, marked Exhibit "A" and by reference made a part hereof, in support of its Motion to Dismiss and Motion to Strike.

WHEREFORE, Defendant, DeKalb County, Georgia prays that its Motion to Dismiss and Motion to Strike be inquired into and sustained.

(Signature omitted in printing)

[223] *AFFIDAVIT*

STATE OF GEORGIA
COUNTY OF DEKALB

Before me, the undersigned attesting officer in and for said State and County, came Cal M. Sandman, who being first duly sworn, deposes and says on oath that he is the Director of Finance and the Administrator for the Financial Services Department of DeKalb County, Georgia and is familiar with the following facts and makes this affidavit in connection with litigation arising out of a crash of a Lear Jet in DeKalb County, Georgia on or about Feb. 26, 1973, and says as follows: That on December 31, 1971 and December 31, 1972, the DeKalb-Peachtree Airport operated at a loss as reflected on Exhibits E-4 for the above-mentioned years which are attached hereto and made a part hereof.

Deponent further says that as of the date of this affidavit no figures are available for 1973 for the reason that no audit of the Airport has been made to date, but said figures should be available sometime in April 1974.

/s/ CAL M. SANDMAN
CAL M. SANDMAN

(Jurat omitted in printing)

[224] EXHIBIT E-4

DeKALB COUNTY, GEORGIA
DeKALB-PEACHTREE AIRPORT FUND
OPERATING FUND
STATEMENT OF NET INCOME (LOSS)
FOR THE YEAR ENDED DECEMBER 31, 1971

RENTAL REVENUES:	
Commercial tenants	$238,169
General Fund	1,877
	240,046
OPERATING EXPENSES:	
Salaries and employee benefits	60,831
Professional and consulting fees	2,204
Maintenance and repairs	144,547
Postage	227
Telephone and telegraph	799
Supplies	962
Convention expense, dues and subscriptions	957
Vehicle expense	9,416
Depreciation	118,857
Administrative expense	23,089
Insurance—other than group	567
Total Operating Expenses	362,456
OPERATING INCOME (Loss)	(122,410)
OTHER INCOME:	
Vending machine collections	70
Damage claims	26
General Fund contribution	1,733
Total Other Income	1,829
NET INCOME (Loss)	($120,581)

/s/ CAL M. SANDMAN

The note on Exhibit E-1 is an integral part of this exhibit.

[225]

DeKALB COUNTY, GEORGIA
DeKALB-PEACHTREE AIRPORT FUND
OPERATING FUND
STATEMENT OF NET INCOME (LOSS)
FOR THE YEAR ENDED DECEMBER 31, 1972

RENTAL REVENUES:	
Commercial tenants	$266,376
General Fund	1,457
	267,833
OPERATING EXPENSES:	
Salaries and employee benefits	60,545
Professional fees	6,482
Maintenance and repairs	169,766
Postage	220
Telephone and telegraph	703
Conferences, dues and subscriptions	1,077
Vehicle expense	4,266
Depreciation	120,775
Administrative expense	6,804
Insurance—other than group	547
Contributions to	
Capital Projects Funds	5,750
Total Operating Expenses	376,935
OPERATING INCOME (Loss)	(109,102)
OTHER INCOME:	
Other operating revenue	57
Damage claims	69
Total Other Income	126
NET INCOME (Loss)	($108,976)

/s/ CAL M. SANDMAN

PART C
APPENDIX
IN
NO. 76-700

FIREMAN'S FUND INSURANCE COMPANY,
Petitioner,

v.

DEKALB COUNTY, GEORGIA, *et al.*,
Respondents.

PLAINTIFFS

DEFENDANTS

US

9/25/74

Manget, T. F., etc.

ATTORNEYS

J. Arthur Mozley
Smith, Cohen, Ringel, Kohler, Martin & Lowe
2400 First National Bank Tower
Atlanta, Ga. 30303
(658-1200)

Kendall K. Willard
Harvey, Willard & Elliott
125 Trinity Place
Decatur, Georgia (atty. for Manget
& Suhl, Williams, Callaway, Smith,
Meade Burns (Morris, Ward & Colliers
Long, Steinberg, Ansley & Wheeler
3000 The Equitable Bldg.
Atlanta, Ga. 30303 525--5903

CAUSE

Claim against U.S.A. and others for damage to airplane in crash, based on Federal Tort Claims Act, 28 USC 1346 and diversity, 28 USC 1332.

John W. Stokes, Jr.
William D. Mallard, Jr.
George M. Fleming
Torts Section, Civil Division
U.S. Department of Justice
Washington, D.C. 20530
202 739-4689

Clerk's fee $15.00
Marshal $37.80
Marshal's fee 8-1-74 $72.18

CHECK HERE CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			JURY DEMAND
	DATE	RECEIPT NUMBER	C.D. NUMBER	PLAIN / DEFT
	JAN 8 1974	Smith, Cohen, Ringel, Kohler, Martin & Lowe	#62	DATE
	OCT - 4 1974	Smith, Cohen, Ringel et al	#56	STATISTICAL CARD
				CARD / DATE STAMPED
				JS5
				JS6

UNITED STATES DISTRICT COURT DOCKET

BEST COPY AVAILABLE

DATE	PROCEEDINGS	
Jan. 5	Complaint, filed.	
	Summons issued and delivered to U. S. Marshal.	
Feb. 1	Marshal's return of service executed as to [illegible] on 1-30-74; as to A. C. Guhl, U. A. Williams, T. M. Callaway, Jr., Hoke Clayton Smith, Robert J. Morris, Horis A. Ward, W. M. Coolidge, DeKalb County and Dekalb County on 1-23-74; as to H. F. Manget on 1-28-74, filed. /JURY DEMAND, filed.	plt
Feb. 12	ANSWER of Dekalb County, Georgia and the chairman and members of the Board of Commissionsers of Roads and Revenues of Dekalb County, filed.	
20	Defts. Dekalb County, Georgia, A. C. Guhl, T.M. Callaway, Jr., Hoke Clayton Smith, Robert J. Morris, Horis A. Ward, and W. M. Coolidge	
	Motion to dismiss, filed. Motion to Strike, filed. Brief in support of motion to dismiss and strike, filed. Motion to dismiss for insufficient service of process with affidavits and brief in support, filed.	jmw
15	Deft. U.S.A.'s Motion to Consolidate w/brief and Proposed Order filed.	
	H. F. Manget, ind. & manager	jb
19	Consent Order ext. time thru 3/11/74, for deft/to file answer, etc.,, filed. (Copies furn)	skb
	Consent Order extending time thru 3011-74 for County defts. to answer, etc., filed. C. furn.	lkn
21	Summons reissued & delivered toU.S. Marshal on complaint as to county defts and Dekalb County.	plt
21	Response of pltf. to motion for consolidation filed by deft. U.S.A., filed.	jmw
March 5	Notice of appearance of George M. Fleming, Torts Section, Civil Division, Department of Justice, Washington, D. C. as add'l counsel for U. S., filed.	pld
5 11	RESPONSE of H. F. Manget with JURY DEMAND, filed.	lkn
5 12	RESPONSE of DeKalb County, Georgia and the Chairman and Members of the Board of Commissioners of Roads and Revenues of DeKalb County, filed.	
13	SUBMITTED ON DEFT' U.S.A.'S MOTION TO CONSOLIDATE.	ajb
	ORDER by the Court upon consent of ptys. ext. time thru 4/1/74 deft. U.S. to respond to complaint, filed.(c. counsel)	dt
15	Consent ORDER ext. time thru 3-26-74 for pltf to file any brief and pleadings in response to motions to dismiss and motions to strike filed by Comty defts. filed. (copy to counsel)	plt
101 25	Brief of pltf. in opposition to motion to dismiss and motion to strike filed by the Dekalb County defts, filed.	jmw
28	SUBMITTED ON DEKALB COUNTY DEFTS. MOTION TO DISMISS, MOTION TO STRIKE, MOTION TO DISMISS FOR INSUFFICIENT SERVICE OF PROCESS.	jmw
128	Pltf's 1ST AMENDMENT TO COMPLAINT & ORDER ALLOWING same filed subject to objection, filed. C. furn. To WCO....	lkn
APRIL 5	United States Memorandum in opposition to Dekalb County's motion to dismiss as to the cross-claim of the United States, filed. TO WCO	jmw
	Deft. United States ANSWER, CROSS-CLAIM, and COUNTERCLAIM, filed.(WCO)	jmw
1908	Supplementalbrief of DeKalb County, Ga. & the individual defts., filed. To WCO.	lkn
10	ANSWER of pltf to counter-claim of def. USA, filed. To WCO	pdt
	Pltf's motion to dismiss counter-claim of deft USA with brief, filed. To WCO	pld
12	Deft USA's ANSWER to pltf's first amendment to complaint, filed. To WCO	"
15	ANSWER of Dekalb County to Corss-claim of deft, USA, filed.	pdt
16	Response of Plaintiff to the answer of Defendant U.S. to 1st Amendment of Comolaint filed. with cert. of service.	sdm
16	Order extending time to file answer through May 6, 1974 by all defendants to amended complaint, filed. c.f. by counsel.(Contd)	sdm

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF: FIREMAN'S FUND INSURANCE CO. | DEFENDANT: UNITED STATES OF AMERICA, et al | DOCKET # | PAGE 2

DATE	PROCEEDINGS
1974	
May 7	SUBMITTED ON PLTF'S MOTION TO DISMISS COUNTER-CLAIM OF DEFT. USA.
1926	Deft Dekalb County Georgia's Motion To Dismiss The Amended Complaint, filed. WCO
200	Deft Dekalb County, Georgia's Motion To Strike The Amended Complaint, filed. WCO
203	Brief of deft Dekalb County, Georgia in support of motions to dismiss and strike the amended complaint, filed. WCO
207	RESPONSIVE PLEADINGS of Dekalb County, Georgia & The Chairman and Members of The Board of Commissioners of Roads & Revenues of Dekalb County to pltf's 1st Amended Complaint, with JURY DEMAND, filed. WCO
212	RESPONSIVE PLEADINGS of H. F. Manget to pltf's 1st Amended Complaint, with JURY DEMAND, filed. WCO
216 10	Pltf's Brief in response to Dekalb County's motions to dismiss & strike the amended complaint, filed. WCO
223 June 27	ORDER filed - GRANTING U S's motion to consolidate case with C.A. 19293 for discovery purposes but deferring ruling on consolidation for trial purposes until the pretrial hearing; DENYING DeKalb Co's motion to strike portions of pltf's complaint; GRANTING DeKalb Co's motion to dismiss pltf's complaint as to claims of negligence, nuisance & for breach of contract; GRANTING pltf's motion to dismiss the counterclaim of U S. (copy to counsel, 6/28) U S's cross-claims still pending against DeKalb Co defts.
X	
237 JULY 3	Motion of Southeast Machinery, Inc., Machinery Buyers Corp. and Fireman's Fund Insurance Company to vacate, set aside, alter and amend the orders entered on June 27, 1974 and for reconsiderat rehearing and new trial with memo, filed.
243 12	Brief of Dekalb Co., Ga. in opposition to the motions of Southeast Machiner, Inc., Machinery Buyers Corp., & Fireman's Fund Ins.,Co. to set aside, Vacate, Amend & alter the orders of for reconsiderati rehearing, and new trial on the orders entered on 6-27-74,filed.
15	Response to pltf's 2nd request for admission addressed to deft. USA, filed.
246 22	Supplemental brief of DeKalb Co, Ga in opposition to various motions filed by Southeast Machinery, Inc., et al, with attachment, filed.
29	SUBMITTED ON DEFTS' SOUTHEAST MACHINERY, INC., MACHINERY BUYERS CORP., AND FIREMAN'S FUND INSURANCE CO'S MOTION TO VACATE, SET ASIDE, ALTER AND AMEND THE ORDERS ENTERED 6/27/74 AND FOR RECONSIDERATION, REHEARING AND NEW TRIAL.
31	Deft USA's request to produce & permit inspection and copying, filed. In 19293 (Orig & Dup Req) WCO
	Deft USA's 3rd interrogs. to pltfs' Mirse, filed. IN 19293 (Orig & Dup Req) WCO
Aug. 1	Southeast Machinery, Inc., Machinery Buyers Corp. & Fireman's Fund Insurance Co's notice to take depositions,filed. WCO
	Marshal's return of service as to William A. Williams on 2-21-74; as to Horis A. Ward, A.C. Guhl, Hon. MarionsGuess, Jr., Mrs. Mary Jones, Cal Sandman & T. M. Callaway, Jr. all on 2-22-74; as to Robert J. Morris on 2-23-74; as to Hoke Clayton Smith on 6-25-74; return unexecuted as to W. M. Coolidge, filed. WCO
2	Defts' Supplemental Notice to Take Depositions w/exhibit A, filed
X D.	[illegible] of close of Case

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF | DEFENDANT | DOCKET NO. | PAGE

DATE 1974	PROCEEDINGS
AUG. 5	Deft. U.S.A. answers to pltf. Mirees' 2nd. interrogs., filed.
19	Deft USA'S memorandum in support of the motion of Southeast Machinery, Inc., Machinery Buyers Corp., & Fireman's Fund Ins. Co. to vacate, set aside, alter and amend the orders of 6/21/74 and for reconsideration, rehearing and new trial, filed. WCO
20	Response of Machinery Buyers Corp., Southeast Machinery, Inc., & Fireman's Fund Insurance Co.' to the request to produce and permit inspection and copying of the USA, filed. (Orig. & Dup. to WCO
27	United States' ANSWERS to the Miree pltfs' 3rd interrog., filed. To WCO
Sept. 4	Deft's request for production of documents, filed. WCO
247	[illegible]
	[illegible] the Clerk is directed to enter Final Judg. dismissing DeKalb Co. from this case, filed.(c. counsel)
273	JUDGMENT filed and entered that the pltf. take nothing, that the action be dismissed as to deft. DeKalb County and that the cost of action be taxed upon final judg. of all defts.(c. counsel)
274 Oct. 2	ORDER amending Final Judgment excluding H. F. Manget, Jr. from the entry of Final Judgment, so that H. F. Manget, Jr. remains as a party defendant, filed.(c. counsel)
277	$250.00 APPEAL BOND, filed.
276	Pltf's NOTICE OF APPEAL, filed. (Copy Counsel & certified copy of notice & docket sheet to USCA 10/7)
10	Deposition of HENRY F. MANGET, JR. Partial filed (in 19293)
16	Deft, U. S. A.'s Motion for Summary Judgment w/memorandum and exhibits, filed. Consent Order by Clerk extending time through November 20, 1974 for pltf to respond to deft, U. S. A.'s Motion for Partial Summary Judgment, filed. (CF)
18	Pltf's response to deft, United States of America's Request for Production of Documents, w/attachments, filed. (Copies requested)
Nov. 1	Deft. U.S.A.'s interrogs to defts Machinery Buyers Corp and Southeast Machinery, Inc, filed.
285	Joint designation of record on appeal & stipulation of parties that parts of the record on appeal be retained in the District Court, filed.
286 12	ORDER to forward copies on appeal in lieu of originals, filed. c. counsel.

ATTEST: A TRUE COPY
CERTIFIED THIS
11-13-74
Leon H. Carter, Clerk
By: Lonan Nalty
Deputy Clerk

BEST COPY AVAILABLE

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[5] Filed: Jan. 8, 1974

FIREMAN'S FUND INSURANCE COMPANY,

Plaintiff,

v.

UNITED STATES OF AMERICA;
DEKALB COUNTY, GEORGIA;
A. C. GUHL, in his capacity as Chairman of the Board of Commissioners of Roads and Revenues of DeKalb County;
WILLIAM A. WILLIAMS, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
T. M. CALLAWAY, JR., in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
HOKE CLAYTON SMITH, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
ROBERT J. MORRIS, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
HORIS A. WARD, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
W. M. COOLIDGE, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County; and
H. F. MANGET, individually and as Airport Manager of the DeKalb-Peachtree Airport,

Defendants.

CIVIL ACTION NO. C-7424-A

[6]

COMPLAINT

Comes now plaintiff and as its first claim for relief respectfully shows to the Court the following:

COUNT ONE

1.

Plaintiff Fireman's Fund Insurance Company is a corporation incorporated under the laws of California, with its principal office and place of business in San Francisco, California. Said plaintiff is not a citizen of Georgia.

2.

(a) Defendant United States of America is subject to the jurisdiction of this Court and may be served with the complaint and summons as provided by law.

(b) Defendant DeKalb County, Georgia is a political subdivision of the State of Georgia and is located within this District. Said defendant is subject to the jurisdiction of this Court and may be served with the complaint and summons as provided by law.

(c) Defendant A. C. Guhl is sued in his capacity as Chairman of the Board of Commissioners of Roads and Revenues of DeKalb County. Said defendant is a citizen of Georgia and resides within this District, and said defendant is subject to the jurisdiction of this Court and may be served with the complaint and summons as provided by law.

(d) Defendant William A. Williams is sued in his capacity as a Member of the Board of Commissioners of Roads and Revenues of DeKalb County, Georgia. Said defendant is a citizen of Georgia and resides within this District, and

said defendant is subject to the jurisdiction of this Court and may be served with the complaint and summons as provided by law.

(e) Defendant T. M. Callaway, Jr. is sued in his capacity as a Member of the Board of Commissioners of [7] Roads and Revenues of DeKalb County, Georgia. Said defendant is a citizen of Georgia and resides in this District, and said defendant is subject to the jurisdiction of this Court and may be served with the complaint and summons as provided by law.

(f) Defendant Hoke Clayton Smith is sued in his capacity as a Member of the Board of Commissioners of Roads and Revenues of DeKalb County, Georgia. Said defendant is a citizen of Georgia and resides in this District, and said defendant is subject to the jurisdiction of this Court and may be served with the complaint and summons as provided by law.

(g) Defendant Robert J. Morris is sued in his capacity as a Member of the Board of Commissioners of Roads and Revenues of DeKalb County, Georgia. Said defendant is a citizen of Georgia and resides in this District, and said defendant is subject to the jurisdiction of this Court and may be served with the complaint and summons as provided by law.

(h) Defendant Horis A. Ward is sued in his capacity as a Member of the Board of Commissioners of Roads and Revenues of DeKalb County, Georgia. Said defendant is a citizen of Georgia and resides in this District, and said defendant is subject to the jurisdiction of this Court and may be served with the complaint and summons as provided by law.

[7]

(i) Defendant W. M. Coolidge is sued in his capacity as a Member of the Board of Commissioners of Roads and Revenues of DeKalb County, Georgia. Said defendant is a citizen of Georgia and resides in this District, and said defendant is subject to the jurisdiction of this Court and may be served with the complaint and summons as provided by law.

(j) Defendant H. F. Manget is sued individually and in his capacity as DeKalb County's Airport Manager of the DeKalb-Peachtree Airport. Said defendant is a citizen of Georgia and resides in this District, and said defendant is subject to the jurisdiction of this Court and may be served with the complaint and summons as provided by law.

[8]

3.

(a) With respect to defendant United States of America, this action is brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346(b). More than six months prior hereto, plaintiff and its insured submitted an appropriate administrative claim to defendant United States of America with respect to the damages sought in this action, and said defendant failed to make a final disposition of said claim within six months thereafter. Plaintiff therefore has exhausted its administrative remedies in accordance with 28 U.S.C. §2675, and this action is brought within the period of time specified in 28 U.S.C. §2401(a). Jurisdiction of this action in this Court against defendant United States of America is properly founded upon the Federal Tort Claims Act and other applicable laws.

(b) With respect to the remaining defendants, there is complete diversity of citizenship and the value of the

[9]

matter in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00. Jurisdiction of this action in this Court with respect to the remaining defendants is therefore properly founded upon 28 U.S.C. §1332 and §1391. All of the remaining defendants were placed on adequate and sufficient notice of the claims asserted herein, prior to the filing of this action.

4.

Hereinafter defendant United States of America will sometimes be referred to as "defendant F.A.A.," and the remaining defendants will sometimes be referred to as the "County defendants."

5.

On February 26, 1973, at approximately 10:12 a.m., E.S.T., a Learjet Model 24 aircraft, N-454RN, owned by Southeast Machinery, Inc., was in the process of taking off from Runway 20L at DeKalb-Peachtree Airport. Immediately after becoming airborne, and while within the boundaries of the airport [9] and at an altitude of approximately 400-500 feet, the turbine or jet engines of said aircraft ingested a large number of starlings or similar birds, resulting in the sudden loss of power in both engines and the crash and total destruction of said aircraft and the death of all seven persons aboard the aircraft. The sole physical cause of said crash was loss of engine power and engine failure in both turbine or jet engines, resulting directly and solely from the ingestion of a large number of starlings or similar birds in both engines.

6.

The aircraft in question was a Learjet, Model 24, twin

engine turbine-powered jet airplane manufactured by Gates Learjet Corporation, and the engines of said airplane were Model CJ-610-4 turbine-powered jet engines manufactured by General Electric Company.

7.

Shortly prior to the takeoff of the airplane, one of the members of the flight crew of the airplane had filed an IFR (Instrument Flight Rules) flight plan with and had received a weather briefing from the Atlanta Flight Service Station with respect to the proposed flight of the airplane from DeKalb-Peachtree Airport to a destination in Florida. At no time during said procedures did any personnel of the Atlanta Flight Service Station in any way inform, advise, suggest, indicate or intimate to the flight crew that there was or might be any type of bird hazard at DeKalb-Peachtree Airport, and the personnel of the Atlanta Flight Service Station did not in any way warn the flight crew of any bird hazard, bird problem or bird-attracting open garbage dump at said Airport.

8.

The Atlanta Flight Service Station is a facility operated, supervised and manned by defendant F.A.A. for the [10] purposes, among other things, of recording and filing flight plans and furnishing pilots with relevant data and information concerning weather, flight conditions and various other matters concerning safety of flight. At and prior to the time of the flight in question, defendant F.A.A. (including personnel of the Atlanta Flight Service Station) had actual knowledge that a bird hazard, bird problem and bird-attracting open garbage dump existed at DeKalb-Peachtree Airport.

9.

Prior to the beginning of the flight in question, and in accordance with Federal Aviation Regulations, the flight crew of the airplane had contacted both the ground control and tower control facilities of defendant F.A.A. at the Airport and had advised defendant F.A.A. of the proposed I.F.R. flight from DeKalb-Peachtree Airport. In response to such communications from the flight crew, the defendant F.A.A. through its ground control and tower control facilities instructed and directed the flight crew to taxi the Learjet to Runway 20L, and cleared the Learjet for takeoff, without any warning, suggestion, advice, indication or intimation to the flight crew that a bird hazard, bird problem or bird-attracting open garbage dump existed at the Airport. At and prior to the time of takeoff, the personnel of defendant F.A.A. who were operating said ground and tower control facilities had actual knowledge that a bird hazard, bird problem and bird-attracting open garbage dump existed at the Airport.

10.

Specifically, the radio communications between the flight crew and the ground and tower control facilities of defendant F.A.A. were in pertinent part as follows:

TIME	:	1451
N45 4RN	:	Ground Learjet four five four Romeo
PDK GC	:	November Lear four five four Romeo November Peachtree Ground
[11]		
N45 4RN	:	Put us on request I F R to ah Miami Beach and we're ready to taxi in about five minutes

PDK GC : Lear four five four R N Roger

TIME : 1453

N454RN : Lear four fifty four R N's I F R to Miami

TIME : 1453

PDK GC : Lear four five four R N Peachtree Ground taxi to runway two zero left wind zero six zero degrees at five altimeter three zero two zero follow the Bonanza approaching from your right front

N454RN : Roger

TIME : 1457

PDK GC : Lear four five four Romeo November clearance

N454RN : Go ahead

PDK GC : Lear four five four Romeo November cleared as filed maintain three thousand expect flight level four one zero within three five miles squawk two zero four one just before departure

N454RN : Roger we're cleared as filed to maintain three expect four one oh in three five miles squawk two zero four one departure nineteen three

PDK GC : Lear four five four Romeo November departure control frequency one one niner point three contact tower one two zero point niner when ready for departure

N454RN : (unintelligible, sounds like er and is probably the last part of the word roger)

TIME : 1459

N454RN : How much a delay for Romeo November sir

PDK TWR : Well your number four for departure

N454RN : Ok how much a delay for all of us

PDK TWR : I don't know we gonna get the first one out right away

N454RN : OK

TIME : 1510

PDK TWR : Lear ah four five four Romeo November taxi into position and hold

N454RN : Roger

TIME : 1511

PDK TWR : Lear four five four Romeo November turn ah right heading two five zero for vectors cleared for takeoff

N454RN : Roger

TIME : 1512

PDK TWR : Lear four five four Romeo November it appeared the ah left engine laid a pretty good layer of smoke out of the left side there for approximately ah three or four hundred feet ah over

N454RN : We just hit some birds

PDK TWR : Ah roger ah you retur turning to land

N454RN : Dont' believe we gonna make it

PDK TWR : Can you tell us where your going down

After the crash the remains of many dead starlings or cowbirds or similar birds were found at or near the departure end of Runway 20L, and bird remains and particles of protein matter were found on the airplane windshield and center post and in the airplane engines. Also, immediately prior to and after the crash large flocks of starlings, cowbirds or similar birds were located in and about the Airport boundaries and the adjacent garbage dump operated by the County defendants.

12.

Prior to the crash, both the defendant F.A.A. and the County defendants had actual knowledge that birds could be ingested into turbine or jet engines, including Learjet engines, and that turbine or jet engine bird ingestion could cause a loss of engine power and an engine failure and a crash. Prior to the crash, the defendant F.A.A. and the County defendants also had actual knowledge that a dangerous bird hazard, bird problem and bird-attracting open garbage dump existed at the Airport.

13.

This action is brought by plaintiff to recover the damages sustained as a result of the aforesaid total destruction of the Learjet airplane. Immediately prior to the crash the fair and reasonable market value of the Learjet airplane was $565,000.00, and immediately after the crash the airplane was totally worthless, except for salvage. The reasonable and fair market value of the salvage remains of said aircraft was $15,568.00. Plaintiff therefore claims as its damages the sum of $549,432.00.

14.

Prior to the crash plaintiff Fireman's Fund Insurance Company had issued to its insured, Southeast Machinery, Inc., a policy of insurance whereby the Learjet airplane in question was insured against the peril of property damage, including total loss [13] and destruction. As a result of the aforesaid loss of the insured airplane and pursuant to said insurance policy Fireman's Fund Insurance Company prior hereto paid to Southeast Machinery, Inc. the sum of $565,000.00, representing the total amount of the loss, and Southeast Machinery, Inc. assigned to plaintiff the

right to sue and cause of action for the loss of said airplane. As a result of said payment under said policy for said loss, Fireman's Fund Insurance Company became subrogated by operation of law to the rights of Southeast Machinery, Inc. against the defendants herein, in the amount of $549,432.00. Fireman's Fund Insurance Company, both as subrogee and as assignee, therefore is the proper party plaintiff in this case.

15.

As indicated above, the flight crew of the aircraft had prior to takeoff filed an Instrument Flight Rules (I.F.R.) flight plan with the defendant F.A.A. for a proposed flight from DeKalb-Peachtree Airport to Miami, Florida, with a proposed departure time of 9:50 a.m., E.S.T., and a proposed en route altitude of 41,000 feet (Flight Level 410). This flight plan also specified the type of aircraft (Learjet Model 24) and listed five passengers on board, an estimated en route flight time of one hour ten minutes, and fuel on board for two hours thirty minutes. The flight crew received from defendant F.A.A. the I.F.R. clearance as filed, and the flight was directed to and cleared for takeoff from Runway 20L by the defendant F.A.A. at 10:10.40 a.m., E.S.T.

16.

The weather at and prior to takeoff was overcast, with a ceiling of no more than 500 feet. Visibility was restricted by the overcast sky and low ceiling and by fog and smoke, and the wind, which was blowing from 060 degrees at least at four knots, was causing fog, smoke and haze to drift across the generally North to South runway (20L) in a generally East to West direction.

[14]

17.

The takeoff runway, designated as Runway 20L, was 5,000 feet in length. The open garbage dump in question is located in a [14] depression or low area approximately midway down the runway and many hundreds of feet east of the boundary of the runway. The open garbage dump is surrounded by trees and other foliage and is not visible to a person standing on Runway 20L or to a person in the flight deck or cockpit of a Learjet Model 24 aircraft located on Runway 20L. Specifically, the open garbage dump was not visible to the flight crew of the airplane in question. The open garbage dump was, however, visible to the air traffic control specialists employed by defendant F.A.A. and located in the air traffic control tower maintained and operated by defendant F.A.A. Also, the airplane in question was at all times visible to said air traffic control specialists.

18.

At the time of and prior to the flight in question the flight crew of the airplane was not aware of and had no knowledge of the existence of a bird hazard, bird problem or bird-attracting open garbage dump at the Airport. Moreover, because of instrument weather conditions, restrictions to visibility, length of the runway and location of the open garbage dump in relation to the runway, and because of the flight crew's necessary attention to required cockpit duties during the I.F.R. takeoff, and because of the sharp nose-up attitude of the jet airplane after becoming airborne, it was not possible for the flight crew of the airplane to learn of or observe any birds or bird hazards prior to the midair impact with and engine

[15]

ingestion of the birds, and it was not possible for the flight crew to take any in-flight actions to avoid collision with the birds.

19.

At and prior to takeoff of the airplane, however, the defendants herein knew that a bird hazard, bird problem and bird-attracting open garbage dump existed at the Airport, and that extremely large flocks of starlings and similar types of birds were located within the Airport boundaries and in dangerously [15] close proximity to Runway 20L. Despite this knowledge, the defendants herein failed to warn the flight crew of the airplane of the bird hazard, bird problem and bird-attracting open garbage dump.

20.

The United States of America, through the Department of Transportation and the Administrator of the F.A.A., has been directed by Congress in the Federal Aviation Act of 1958, as amended, to assume responsibility as follows:

> "to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest." 49 §1348(a).

21.

The United States of America, through the Department of Transportation and the Administrator of the F.A.A.,

is further authorized by Congress in said Act to assume responsibility as follows:

> "(1) to acquire, establish, and improve air-navigation facilities wherever necessary;
>
> (2) to operate and maintain such air-navigation facilities; . . .
>
> (4) to provide necessary facilities and personnel for the regulation and protection of air traffic." 48 U.S.C. §1348(b).

22.

The United States of America, through the Department of Transportation and the Administrator of the F.A.A., is further directed by Congress in said Act to assume responsibility as follows:

> "to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects." 49 U.S.C. §1348(c).

23.

The aforementioned directions to and placement of responsibility on the United States of America are pursuant to the Congressional determination found at 49 U.S.C. §1303 that the United States of America through the Administrator of the F.A.A. shall consider the following as being in the public interest:

> "(a) The regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense;
>
> (b) The promotion, encouragement, and development of civil aeronautics;
>
> (c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of safety and efficiency of both;
>
> (d) The consolidation of research and development with respect to air navigation facilities, as well as the installation and operation thereof;
>
> (e) The development and operation of a common system of air traffic control and navigation for both military and civil aircraft."

24.

The United States of America, through the Department of Transportation and the Administrator of the F.A.A., is further given the duty by Congress in said Act as follows:

> "to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time: . . .
>
> (6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for . . . safety in air commerce." 49 U.S.C. §1421(a)(6).

25.

Pursuant to the aforesaid authority and directions from Congress the United States of America administers air

traffic control of civil air operations within United States airspace; operates F.A.A. air route traffic control centers, airport traffic control towers, flight service stations, and related communications equipment required for control of air traffic; and collects and disseminates information relative to civil aeronautics and safety of flight.

[17] 26.

Also pursuant to said Congressional authority and directions the United States of America has established as being necessary and operates air navigation facilities, including an Airport Traffic Control Tower (ATCT) at DeKalb-Peachtree Airport and a flight service station in Fulton County, Georgia, which flight service station serves the geographical area in which DeKalb-Peachtree Airport is located.

27.

An ATCT is a central operations facility in the terminal air traffic control system, consisting of a tower cab structure, including an associated IFR room if radar equipped, using air/ground communications and/or radar, visual signaling and other devices, to provide safe and expeditious movement of air and ground traffic.

28.

The ATCT at DeKalb-Peachtree Airport is operated by the F.A.A. and is "responsible for the safe, orderly and expeditious flow of air traffic in the vicinity of an [the] Airport." 30 F.R. 3395, as amended; 16 F.R. 2975, 2979, revised 19 F.R. 2098, §24.

29.

Said ATCT is manned by personnel (employed by the

United States of America) "who are responsible for the safe and orderly flow of air traffic in the vicinity of the Airport." Their principal duties are as follows:

(a) "To issue instructions to pilots for taxiing, take-off, approach for landing, and landing of aircraft.

(b) "To inform pilots regarding field and weather conditions, air navigational facilities, emergency landing areas, restrictions to flight, regulations, and other matters which may be of assistance to the pilot.

(c) "To relay messages between pilots, airline operations offices, Air Route Traffic Control Centers, Weather Bureau offices, Communications Stations and other appropriate agencies concerning the operation, dispatch, and control of aircraft.

(d) "To invoke emergency procedures when any emergency occurs or appears likely to occur to aircraft under tower control.

(e) "When equipped with airport surveillance and precision approach radar, to monitor [18] aircraft arriving and departing from an airport on instruments, and, in an emergency or upon request, issuing ground controlled approach instructions (GCA) for a let-down." 16 F.R. 2974, 2979, revised 19 F.R. 2098, §24.

30.

Pursuant to the authority and directions of Congress, the United States of America, through the Department of Transportation and the F.A.A., prior to the crash in question had issued Advisory Circular No. 150/5200-3A, dated March 2, 1972, entitled "Bird Hazards to Aircraft,"

in which the United States of America through said agencies stated in part as follows:

> "Migratory birds, particularly waterfowl, are a hazard to aircraft due to their size and weight. In recognition of this potential hazard, F.A.A. Air Traffic Control and Flight Service Station facilities issue advisory information on bird activities when they are reported or when they have knowledge of such activities. Information given to pilots includes the position, species or size of bird if known, and their course and altitude."

31.

The defendant F.A.A. in said Advisory Circular also admitted that the birds of greatest potential hazard to aircraft because of size, abundance, or habit of flying in dense flocks, include starlings; that birds of these species are considered particularly hazardous during spring and fall migrations and when they are concentrated in wintering areas; and that at some airports there are large flocks of certain birds which could be a problem during certain seasons. DeKalb-Peachtree Airport is not named or referred to in said Advisory Circular.

32.

To cope with these admitted flight hazards, the Advisory Circular states that the United States of America, through the F.A.A., is operating as follows:

> "F.A.A. Air Traffic Control and Flight Service Station facilities coordinate with airport management for either appropriate alerting action by a Notice to Airmen when flocks of birds are noted to remain in the airport vicinity or for possible closing by a Notice to Airmen when flocks roost on runways."

[19]

33.

The Federal Government personnel providing terminal air traffic control services at airports, including DeKalb-Peachtree Airport, are required by the United States of America to be familiar with the provisions of the Terminal Air Traffic Control Manual, 7110.8, one of the air traffic control manuals referred to in Part 65 of the Federal Aviation Regulations, in which Manual are set forth the following duties and responsibilities of air traffic control personnel:

> "If you observe or are informed of any condition which affects the safe use of a landing area:
>
> (a) Relay the information to the airport manager concerned.
>
> (b) Issue a Notice to Airmen publicizing an unsafe condition if you are unable to contact the airport manager (of if there is no airport manager designated) and then inform the manager as soon as practicable. . . ."

"122. BIRD ACTIVITY
ADDNL SVC

"a. Issue advisory information on the position and, if known, species or size of birds, and their course of flight and altitude if you believe that the safety of flight in that area may be affected. Do this for at least 15 minutes after receipt of such information from pilots or from adjacent facilities unless visual observation or subsequent reports reveal the activity is no longer a factor."

"1552. BIRD ACTIVITY INFORMATION

"a. Issue advisory information on pilot-reported or radar-observed and pilot-verified bird activity.

Include position, species or size of birds, if known, course of flight and altitude. (E)

Phraseology:

FLOCK OF (Species, if known)/(size, if known) BIRDS, (number) O'CLOCK (number of miles) MILES (direction) BOUND:

LAST REPORTED AT (altitude, as determined from pilot report).

or

ALTITUDE UNKNOWN.

FLOCK OF (species, if known)/(size, if known) BIRDS (direction) BOUND ALONG (flyway or geographical route):

LAST REPORTED AT (altitude, as determined from pilot report).

or

ALTITUDE UNKNOWN.

FLOCK OF/NUMEROUS FLOCKS (species, if known)/(size, if known) BIRDS, VICINITY (location):

[20] LAST REPORTED AT (altitude, as determined from pilot report).

or

ALTITUDE UNKNOWN.

b. Relay bird activity information to adjacent facilities and to FSS's whenever it appears it will become a factor in their areas."

34.

The United States of America, through its said agencies and their predecessors, have known about bird hazards to

aircraft at least since the 1940's, when the F.A.A. published a report of the collection and compilation of detailed statistics on the collision of aircraft with birds, which report was admitted into evidence in *Rapp v. Eastern Air Lines, Inc., U.S.A., et al.*, 264 F. Supp. 673 (E.D. Pa. 1967), and which report showed 1946 statistics on bird strikes by aircraft, including there being more than one such collision per day during this early aviation period.

35.

The said Federal Court having before it the Lockheed Electra ingestion of birds at Boston in 1960, held the United States of America negligent as follows:

"5. In failing to prescribe in the type certificate issued for the Electra that the plane could not be used where birds were known to congregate when the C.A.B. knew or should have known that the aircraft was capable of ingesting birds on take-off with resulting loss of power output and which was a serious hazard to a plane, the C. A. B. was negligent.

"6. The Government which had the duty to clear planes for take-off from Logan Airport was negligent in failing to devise a system whereby planes especially of the Electra type would not be cleared for take-off where birds were a known hazard without checking to discover whether birds were at the time of take-off of sufficient quantity to be a menace.

"7. The Government was negligent in failing to require the Massachusetts Port Authority at Logan Airport to remove the attractions to birds on the airport surface by filling in the ponds, closing the dumps, cutting down the phragmites, and prohibiting the dumping of garbage and food particles on the airport surface and in failing to take adequate measures to

insure that birds would not act as airport hazards when planes were taking off. We conclude thusly in light of the fact that the same governmental agency was responsible for certification for clearing planes for take-off and for requiring airports which receive federal assistance to mitigate existing airport hazards." 264 F. Supp. 681.

[21] 36.

DeKalb-Peachtree Airport is located within the boundaries of DeKalb County on land owned by the County, and said Airport is owned, operated and managed and maintained by the County defendants. Said Airport has paved runways and airport hangars, servicing and parking facilities, a control tower with radio facilities, an instrument landing system control center, and access to other radio and navigational aids. The Airport is operated by the County defendants for the public welfare and benefit of the citizens of the United States of America (including plaintiff and plaintiff's insured) and is operated under the jurisdiction of the Federal Aviation Administration.

37.

DeKalb County, Georgia acquired the DeKalb-Peachtree Airport by way of quit-claim deed from the General Services Administration of the United States of America on or about February 15, 1960. The County's personnel operated the control tower at the DeKalb-Peachtree Airport from March, 1959, until January, 1963, when they were replaced by Federal Aviation Administration Air Traffic personnel. On February 26, 1973, the date of the fatal crash complained of herein, the air traffic control tower was operated by Federal Aviation Administration Air Traffic Control personnel.

38.

Beginning in 1962, a portion of the land constituting the Airport site was used by DeKalb County as a garbage dump. In 1964 the dump was closed and remained closed until March, 1966, when it was re-opened. Since that time DeKalb County was utilized the Airport site for dumping garbage.

39.

Employees of DeKalb County at the Airport have observed and reported a significant increase in the number of birds on or in the vicinity of the Airport following the utilization of the Airport site for garbage disposal.

[22] 40.

On and prior to February 26, 1973, DeKalb County had been using the Airport site as an open garbage dump where large quantities of raw garbage, refuse, offal, filth, waste and trash by the truck loads were dumped and deposited upon the Airport site numerous times during each day by personnel and vehicles controlled by said DeKalb County through its Sanitation Department and under the ultimate direction and control of the County defendants.

41.

The said untreated raw garbage, refuse, trash, offal, filth and other waste material deposited by the County defendants as aforesaid created a large area constituting an attraction to birds and causing large flocks of birds to congregate about the Airport, the runways, ends of runways and other areas within the Airport boundaries. The attractiveness of said open garbage dump to birds was

increased by the failure of the County defendants to remove trees, undergrowth and high grass from the area of the open garbage dump and along the runways, which foliage provided roosting, nesting and basking areas for the large flocks of birds attracted to the garbage dump. Said birds at certain times remained, walked and ran upon said runways and adjacent grass areas at the sides and ends of the runways, and congregated in the numerous trees on and about the Airport area. Said birds when located upon the Airport grounds often flew aloft in large flocks many times each day as aircraft would take off, approach, land or fly near said Airport, and said birds constituted a continuous hazard at said Airport to the safety of aircraft and to the safety and lives of the crews and passengers therein and to persons residing and located upon the ground in the vicinity of said Airport.

42.

All of the foregoing was known to the County defendants and to defendant F.A.A. at and prior to the time of the crash involved in this lawsuit.

[23] 43.

The United States of America, by and through the Department of Transportation, Federal Aviation Administration, has the responsibility for the administration of the Federal Airport and Airway Development Act of 1970 and its predecessor, the Federal Airport Act of 1946. Involved in the administration of the programs was the responsibility of enforcing the provisions of the various Grant Agreements issued in accordance with the provisions of these Acts. These Grant Agreements included provisions under which the airport owners maintain and

operate airports in accordance with the standards set forth in these Agreements.

44.

In addition, the United States of America has the responsibility for and jurisdiction over the safety of DeKalb-Peachtree Airport to the extent that it was the duty of the United States of America, as a condition precedent to the granting of funds for Airport development, to receive assurances from the owners of the Airport that airport hazards would be mitigated.

45.

Beginning in June, 1962, the Federal Government entered into six (6) Grant Agreements with DeKalb County, pursuant to which at least $1,025,224.06 was paid to the County for the purpose of assisting the County in the improvement and development of DeKalb-Peachtree Airport, including the construction of Runway 20L-2R which was begun in 1966 and completed in 1968.

46.

Associated with the various Grant Agreements is an airport layout plan developed by DeKalb County and approved by the Federal Aviation Administration which graphically illustrates the development and proposed development of the airport facilities and the use of the land included within the airport boundaries. Such use does not include an open garbage dump or any other dumping ground for garbage.

[24] 47.

Prior to the crash in question, the United States of America, through the Federal Aviation Administration,

recognized that the existence of the open garbage dump constituted an attraction to birds of various species, and that birds constituted a definite hazard for aircraft taking off and landing at the Airport.

48.

From March 9, 1970, through February 14, 1972, the Federal Aviation Administration communicated with officials of DeKalb County, both by letter and by conference, relative to alleviation of the bird hazard caused by the existence of the open garbage dump on the airport site. In February, 1971, the F.A.A. was advised by DeKalb County that the dump would be closed by August, 1972, but DeKalb County failed to keep its word in this regard. Subsequent to said date of February 14, 1972, and for more than one (1) year prior to the date of said fatal crash on February 26, 1973, no further communications, either by letter or by conference, were had by the Federal Aviation Administration with officials of DeKalb County directed toward the alleviation of the bird hazard.

49.

Said letters and conferences were of no avail, and both the defendant F.A.A. and the County defendants negligently failed to remove or reduce the bird hazard at the Airport.

50.

On the 27th day of June, 1967, the Federal Aviation Administration and the United States of America entered into one of a series of similar Agreements with DeKalb County by and through the Chairman of the Board of Commissioners of Roads and Revenues.

51.

Said Agreements in pertinent part provided as follows:

"The Sponsor [DeKalb County] will keep up to date at all times an airport layout plan . . . Such airport layout plan, and each amendment, revision, or modification thereof, shall be subject to the approval of the F.A.A., which approval shall be [25] evidenced by the signature of a duly authorized representative of the F.A.A. on the face of the airport layout plan. The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the F.A.A., if such changes or alterations might adversely affect the safety, utility, or efficiency of the Airport."

52.

The defendant F.A.A. negligently allowed changes in the airport layout, contrary to the official layout plan, when they knew of the existence of said sanitary landfill or garbage dump, and when the defendant F.A.A. had the power and jurisdiction to have mitigated said Airport hazard.

53.

With further reference to said Agreement, as part of the consideration for the sums paid by the United States of America to DeKalb County, said DeKalb County, as Sponsor, agreed as follows:

"These covenants shall remain in full force and effect throughout the useful life of the facilities developed under this Project, . . ." (Project Application, Sponsor's Assurances, Paragraph 1).

and

"The Sponsor will operate the Airport as such for the

use and benefit of the public. . . . The Sponsor may prohibit or limit any given type, kind or class of aeronautical use of the Airport if such action is necessary for the safe operation of the Airport or necessary to serve the civil aviation needs of the public." (Project Application, Sponsor's Assurances, Paragraph 2).

and

"The Sponsor will operate and maintain in a safe and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes." (Project Application, Sponsor's Assurances, Paragraph 6).

and

"In addition, the Sponsor will not erect or permit the erection of any permanent structure or facility which would interfere materially with the use, operation, or future development of the [26] Airport, in any portion of a runway approach area in which the Sponsor has acquired, or may hereafter acquire property interests permitting it to so control the use made of the surface of the land." (Project Application, Sponsor's Assurances, Paragraph 7).

and

". . . The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the F.A.A., if such changes or alterations might adversely affect the safety, utility, or efficiency of the Airport." (Project Application, Sponsor's Assurances, Paragraph 12).

and

"Insofar as is within its power and to the extent reasonable, the Sponsor will take action to restrict the

use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and take-off of aircraft." (Project Application, Sponsor's Assurances, Paragraph 13).

54.

The County defendants violated the provisions of said contract by willfully permitting the existence of an open garbage dump and bird hazard on the Airport site and adjacent to Runway 20L. Said contract having been made for the benefit of the public plaintiff and its insured were third party beneficiaries of said contract and any other contracts and agreements similarly made between DeKalb County and the United States of America. The County defendants are liable for breach of said contract and any other similar contracts and are liable for the damages sustained by plaintiffs resulting from the negligence and recklessness of the County defendants growing out of the breach of said contract.

55.

By reason of the existence of said open garbage dump prior to and on February 26, 1973, the operation of the Airport by the County defendants and defendant F.A.A. constituted a public and private nuisance and a hazard to public safety.

56.

The maintenance of said open garbage dump at said DeKalb-Peachtree Airport constituted an airport hazard as [27] defined in 49 U.S.C. §1101, 49 U.S.C. §1711, and was a violation of 49 U.S.C. §1110 (3) and 49 U.S.C. §1718 (3).

57.

The United States of America, by and through its agents and employees, was guilty of negligence proximately causing and contributing to the damages of plaintiff in the following particulars:

(a) In failing to require DeKalb County to remove and mitigate the Airport bird hazard by reason of the dumping of garbage on DeKalb-Peachtree Airport, the same being negligence per se and negligence as a matter of fact;

(b) In allowing jet propelled aircraft to operate in and out of DeKalb-Peachtree Airport when birds were a known hazard by reason of the existence of the open garbage dump;

(c) In clearing the Learjet airplane for takeoff on February 26, 1973, in spite of the known existence of numerous birds which were located in the vicinity of runway 20L at DeKalb-Peachtree Airport;

(d) In failing to give reasonable and adequate notice to pilots and the flight crew of the Lear Jet of the danger of birds to aircraft at the DeKalb-Peachtree Airport;

(e) In allowing DeKalb County to accomplish a change in the Airport layout plan of DeKalb-Peachtree Airport by establishing and maintaining an open garbage dump thereon, the same being in violation of the airport layout plan which had been previously approved by the United States of America.

58.

The County defendants and their agents, servants and employees, were guilty of breach of contract and negligence arising out of breach of contract with the United

States of America, all of which proximately caused and contributed to the damages of plaintiff, as follows:

[28]

(a) By permitting changes in the DeKalb-Peachtree Airport and its facilities, other than in conformity with the airport layout plan as officially approved by the United States of America, where such changes adversely affected the safety of the Airport;

(b) In operating the DeKalb-Peachtree Airport for the benefit of the public, and in connection therewith failing to prohibit the use of jet propelled aircraft where a portion of the airport was utilized as an open garbage dump attracting large flocks of birds;

(c) In permitting activity at the Airport and facilities thereon which interfered with its use for airport purposes;

(d) In failing to restrict the use of land adjacent to Runway 20L of the Airport to purposes compatible with flight safety and normal operation of the Airport;

(e) In failing to act upon and abide by the specific warning of the United States of America with respect to the hazard created by the open garbage dump and the requests made to remove said dump;

(f) In dumping and depositing untreated garbage, trash, refuse, offal, filth and other waste materials on DeKalb-Peachtree Airport property;

(g) In failing to warn or advise jet aircraft owners and pilots (including plaintiff's insured and the flight crew of the aircraft in question) of the danger created by the flocks of birds located in and about the vicinity of the Airport;

(h) In recklessly and wantonly continuing to use Airport property for an open garbage dump after receiving notice of the bird hazard.

59.

The defendant F.A.A. was also guilty of negligence causing and contributing to plaintiff's damages, in that the Atlanta Flight [29] Service Station personnel and the DeKalb-Peachtree Airport air traffic control tower personnel negligently approved the IFR flight plan filed by the crew of the Learjet and negligently cleared the Learjet for takeoff from Runway 20L, without advising or warning the flight crew of the bird hazard which existed at the airport and in the vicinity of Runway 20L, contrary to the provisions of the Terminal Air Traffic Control Manual referred to in paragraph No. 33, above, and the Advisory Circular referred to in paragraphs Nos. 30, 31 and 32, above, and the provisions of the Federal Register referred to in paragraphs Nos. 28 and 29, above.

60.

The defendant F.A.A., by direction of Congress, is responsible for certification of aircraft as airworthy and for issuing type and production certificates for aircraft, including the Learjet Model 24. The defendant F.A.A. was also guilty of negligence proximately causing and contributing to the damages of plaintiff, as follows:

(a) In issuing a type certificate, production certificate and airworthiness certificate for the Learjet Model 24, including the accident aircraft, without any restrictions as to use of the aircraft in areas of known bird hazards, when defendant F.A.A. knew that the aircraft was capable of ingesting birds and that bird ingestion on takeoff would cause a power loss and a resulting dangerous hazard to the safety of the airplane and all persons aboard the airplane;

(b) In failing to place restrictions on the type certificate, production certificate and airworthiness certificate of the Learjet Model 24, forbidding operation of the aircraft in areas of known bird hazards;

(c) In failing to prohibit operation of Learjet Model 24 aircraft at DeKalb-Peachtree Airport, when defendant F.A.A. knew that a bird hazard existed at said airport; and

[30]

(d) In failing to devise a system or procedure whereby Learjet Model 24 aircraft would not be cleared for takeoff at DeKalb-Peachtree Airport when a bird hazard was known by defendant F.A.A. to exist at said airport, without first determining whether at the time of takeoff birds were present in sufficient quantity to be a menace and hazard to safety of flight.

61.

(a) Georgia Code Section 11-402(2) defines an "airport hazard" as any structure which is hazardous to the use of an airport for the taking off and landing of airplanes.

(b) Georgia Code Section 11-403 declares that an airport hazard endangers the lives and property of users of the airport and is therefore not in the interest of the public health, public safety or general welfare.

(c) Georgia Code Section 11-9902 declares that the violation of any airport zoning regulations shall constitute a misdemeanor.

(d) Section 1(b) of the 1960 DeKalb County Airport Zoning Resolution concerning DeKalb-Peachtree Airport defines an "airport hazard" as any structure or use of land which is "hazardous to such landing or taking off of aircraft."

[30]

(e) Section 5 of the 1960 DeKalb County Airport Zoning Resolution declares that no use may be made of land within any airport approach surface zone, horizontal surface zone, conical surface zone or transitional surface zone at DeKalb-Peachtree Airport, in such manner as to endanger the landing, taking off or manuevering of aircraft.

(f) Section 8 of the 1960 DeKalb County Airport Zoning Resolution declares that no material change shall be made in the use of land at DeKalb-Peachtree Airport and no structure shall be erected, altered, planted or otherwise established in any airport approach surface zone, horizontal surface zone, or conical surface zone unless a permit therefor shall have been applied for and [31] granted. Said Section 8 also declares that no permit shall be granted that would allow the establishment or creation of an airport hazard or permit a non-conforming use or structure to become a greater hazard to air navigation.

(g) Section 14 of said 1960 DeKalb County Airport Zoning Resolution also declares that every violation of said Resolution shall be punishable by fine or imprisonment, or both.

(h) The open garbage dump in question in this case is an airport hazard, as defined by Georgia Code Section 11-402(2) and Section 1(b) of the aforesaid Zoning Resolution. No permit was ever applied for or granted with respect to the establishment and operation of said open garbage dump. The maintenance of said open garbage dump is forbidden by Georgia Code Section 11-403, and by Sections 5 and 8 of said Zoning Resolution. The actions of the County defendants in establishing and operating said open garbage dump violated the aforesaid laws of

Georgia and the aforesaid Zoning Resolution, and constitute negligence per se proximately causing and contributing to plaintiff's damages.

62.

The County defendants were also guilty of negligence per se proximately causing and contributing to plaintiff's damages, in that the County defendants enhanced and increased the bird-attracting nature of said open garbage dump by failing to place a compacted layer of at least six inches of clean earth over all exposed solid waste at the end of each day's operation, and by failing to spread solid waste in uniform layers not over two feet thick, and by failing to compact solid waste prior to covering with earth, and by otherwise operating and maintaining said open garbage dump in violation of the Georgia Solid Waste Management Act (Georgia Code Sections 43-1601, *et. seq.*) and the Rules and regulations of the Georgia Department of Natural Resources, Environmental Protection Division, concerning Solid Waste Management (Rules and Regulations of the State of Georgia, Sections 391-1-1-.1 *et seq.*).

[32] 63.

At all times relevant it was the duty of the County defendants to operate and manage DeKalb-Peachtree Airport in a safe condition. The County defendants were guilty of negligent acts and failures to act and derelictions of duties in their individual, personal capacities and in their official capacities, proximately causing and contributing to plaintiff's damages, in that the County defendants at all times relevant had actual, personal knowledge of the bird hazard and unsafe condition that existed

at the Airport, and in that the County defendants had ample opportunity either to remove the bird hazard and unsafe condition or to prohibit the operation of jet aircraft at the Airport, and in that the County defendants failed to heed the warnings of defendant F.A.A. and others concerning such bird hazard and unsafe condition, and in that the County defendants willfully, wantonly, recklessly and negligently failed either to alleviate the bird hazard and unsafe condition, or to prohibit operation of jet aircraft at the Airport, or to warn the flight crews of jet aircraft of the bird hazard and unsafe condition, or to devise a system, plan or procedure for the warning of jet flight crews of the bird hazard or unsafe condition.

64.

The willful, wanton nature of the negligence and dereliction of duties of the County defendants and the seriousness of the negligence and carelessness of defendant F.A.A. are exemplified by the fact that prior to the fatal crash in question, the County defendants and defendant F.A.A. had received notice of several airplane bird-strike or near bird-strike incidents within the airport boundaries, but despite this knowledge of prior incidents the County defendants and defendant F.A.A. failed to take any action at all to prevent a recurrence of such incidents.

65.

(a) DeKalb-Peachtree Airport is not owned, operated, managed and maintained by the County defendants as a governmental function or enterprise, but, instead, is owned, operated, and [33] maintained and managed by the County defendants as a proprietary or ministerial function or enterprise. In this connection, plaintiff shows

that the County defendants lease substantial portions of the Airport to private companies engaged in commercial operations for profit; that some of such leases are for fixed rental amounts and the remaining leases are for fixed rental amounts plus a percentage of the revenues or income derived by the tenants from their commercial operations; that the revenues thus obtained by the County defendants are not insignificant, but are substantial; and that the Airport is owned, operated, managed and maintained by the County defendants primarily as a source of revenue for the County defendants. In effect, with respect to the ownership, operation, management and maintenance of the Airport, the County defendants act as as a private landlord and not as a governmental entity.

(b) Plaintiff also shows that prior to the date of the crash in question, DeKalb County purchased a policy of liability insurance providing bodily injury liability insurance and property damage liability insurance to the County defendants with respect to the ownership, operation, management and maintenance of DeKalb-Peachtree Airport by the County defendant. Said policy of liability insurance provides coverage to the County defendants with respect to the claims of plaintiff herein, and the property damage liability limits of said insurance coverage applicable to the claims asserted herein are at least $500,000.00. Said policy of insurance also contains a "Waiver of Governmental Immunity" rider which provides as follows:

> "It is agreed that the Company waives any right to deny liability under the policy or to refuse payment within the limits thereof by reason of the nonliability of the insured political subdivision for the

[33]

wrongful or negligent acts of its agents and employees and its immunity from suit as an agency of the State performing governmental functions."

(c) The County defendants are not entitled to the benefit or protection of the doctrine of sovereign immunity with respect to the claims of plaintiff herein.

[34] 66.

Plaintiff also shows that by virtue of the operation of DeKalb-Peachtree Airport by the County defendants under the Uniform Airports Act (Georgia Code Sections 11-204, *et seq.*), and under the Federal Airport and Airway Development Act (49 U.S.C. §§ 1711, *et seq.*) and its predecessor, the Federal Airport Act (49 U.S.C. §§ 1101, *et seq.*) and by virtue of the Grant Agreements and payments of Federal funds referred to earlier in this lawsuit, and by virtue of the application of the provisions of the Georgia Solid Waste Management Act and the Rules and Regulations of the Georgia Department of Natural Resources, Environmental Protection Division (Solid Waste Management) to the facts of this case, and by virtue of the application of the 1960 DeKalb County Airport Zoning Resolution to the facts of this case, an express or implied statutory waiver of the doctrine of sovereign immunity exists with respect to the claims of plaintiff against the County defendants. In the alternative, as a result of the acts and failures to act of the County defendants as alleged herein, and as a result of the acceptance and retention of benefits by the County defendants under the various statutes, rules and regulations and Grant Agreements referred to herein, the County defendants either expressly or impliedly have waived any defense based

[35]

upon the doctrine of sovereign immunity, with respect to the claims of plaintiff herein.

WHEREFORE, plaintiff respectfully prays and demands that process issue as provided by law, requiring defendants to appear and answer this complaint; that plaintiff have judgment against all defendants jointly and severally in the sum of $549,432.00, plus all costs of Court; and that plaintiff have such other and further relief as the Court deems just and proper.

COUNT TWO

As its second and alternative claim for relief, plaintiff respectfully shows to the Court the following:

[35] 1.

Plaintiff incorporates, adopts, repeats and re-alleges herein by reference the allegations of paragraphs numbered 1 through 66 of Count One of this Complaint.

2.

By operating the open garbage dump in the condition and manner described in this complaint, and by managing, maintaining and operating DeKalb-Peachtree Airport in the manner and condition described in this complaint, the County defendants are guilty of maintaining a public and private nuisance injurious to public and private health, person and property.

3.

The maintenance of said nuisance by the County defendants was the proximate and contributing cause of the airplane crash in question, and resulted in special damage to plaintiff and its insured in the sum of $549,432.00.

[35]

WHEREFORE, plaintiff respectfully prays that process issue as provided by law, requiring the County defendants to appear and answer this complaint; that plaintiff have judgment against all of the County defendants jointly and severally in the sum of $549,432.00, plus all costs of Court; and that plaintiff have such other and further relief as the Court deems just and proper.

COUNT THREE

As its third and alternative claim for relief, plaintiff respectfully shows to the Court the following:

1.

Plaintiff incorporates, adopts, repeats and re-alleges herein by reference the allegations of paragraphs number 1 through 66 of Count One of this Complaint.

2.

The County defendants have willfully and wantonly breached, violated and disregarded the provisions, assurances and contractual commitments contained in the aforesaid Grant Agreements [36] and related contracts and documents, all of which Grant Agreements, related contracts and documents were designed and intended to inure to the benefit of plaintiff and its insured, and other members of the public, as third party beneficiaries.

3.

The airplane crash in question and plaintiff's damages were proximately caused by the said breaches of contract by the County defendants, and the County defendants are therefore liable to plaintiff for breach of contract in the sum of $549,432.00.

[51]

WHEREFORE, plaintiff respectfully prays that process issue as provided by law, requiring the County defendants to appear and answer this complaint; that plaintiff have judgment against all of the County defendants jointly and severally in the sum of $549,432.00, plus all costs of Court; and that plaintiff have such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ J. ARTHUR MOZLEY
J. ARTHUR MOZLEY
Attorney for Plaintiff

Of Counsel:

SMITH, COHEN, RINGEL,
KOHLER, MARTIN & LOWE
2400 First National Bank Tower
Atlanta, Georgia 30303

(404) 658-1200

NOTE: Portion of Record Omitted
Filed in Its Original Form

(Caption omitted in printing)

[50] Filed: Feb. 12, 1974

MOTION TO STRIKE

Now come DEKALB COUNTY, GEORGIA, A. C. GUHL, T. M. CALLAWAY, JR., HOKE CLAYTON SMITH, ROBERT J. MORRIS, HORIS [51] A. WARD, and W. M. COOLIDGE, some of the defendants in the

above-styled action, and move the Court, pursuant to Rule 12, Federal Rules of Civil Procedure, for the dismissal of the Complaint, showing the Court as follows:

1.

The Complaint fails to state a claim or a cause of action against Dekalb County, Georgia, upon which relief can be granted.

2.

None of the claims asserted against defendant, Dekalb County, Georgia, can be granted owing to its constitutional governmental immunity which has not been waived, either expressly or impliedly.

3.

More particularly, Dekalb County, Georgia, shows the Court that the Complaint fails to state a claim upon which relief can be granted in the following respects:

(a) In Georgia, no right of action will lie against a county for the creation and, or maintenance of a nuisance;

(b) Plaintiff cannot recover against Dekalb County, Georgia, on a theory of negligence as a matter of law owing to said defendant's constitutional governmental immunity from suit which has not been waived, either expressly or impliedly;

(c) The statutes, ordinances, and regulations recited in the Complaint do not create in plaintiff a cause of action against this defendant;

(d) Dekalb County, Georgia, maintains the Dekalb-Peachtree Airport as a governmental function and, as such, is constitutionally immune from suit by this plaintiff.

(e) There is no right of action in plaintiff, as a third-party beneficiary, on any alleged breach of any Federal Grant Agreements entered [52] into by and between Dekalb County, Georgia, and the Federal Aviation Administration because there is no intent made manifest within such Federal Grant Agreements to confer upon third persons the type of benefit claimed by plaintiff in this action;

(f) Even if the Federal Grant Agreements entered into by and between Dekalb County, Georgia, and the Federal Aviation Administration were intended to benefit the public in the manner claimed by plaintiff, the Complaint shows on its face that these Federal Grant Agreements had not been breached by Dekalb County, Georgia, in operating a sanitary land fill on property contiguous to Dekalb-Peachtree Airport in that the Federal Aviation Administration is alleged to have had knowledge of and thus to have consented to and consciously allowed the maintenance of said land fill;

(g) Even if plaintiff otherwise had the right to sue as a third-party beneficiary for an alleged breach of the Federal Grant Agreements entered into by and between Dekalb County, Georgia, and the Federal Aviation Administration, plaintiff cannot recover the damages sought stemming from the alleged breach because a third-party beneficiary's rights under any contract are no greater than the rights of the parties themselves, and the Federal Grant Agreements which plaintiff alleges to have been breached confers no right on any party to recover the damages sought in the Complaint.

[52]

WHEREFORE, defendant, DEKALB COUNTY, GEORGIA, A. C. GUHL, T. M. CALLAWAY, JR., HOKE CLAYTON SMITH, ROBERT J. MORRIS, HORIS A. WARD, and W. M. COOLIDGE, pray that their Motion be inquired into and sustained and that the Complaint be dismissed as to them.

Respectfully submitted,

HARVEY, WILLARD & ELLIOTT

By: /s/ WENDELL K. WILLARD
WENDELL K. WILLARD

125 Trinity Place
Decatur, Georgia

[53] LONG, WEINBERG, ANSLEY & WHEELER

By: /s/ MEADE BURNS
MEADE BURNS

By: /s/ F. CLAY BUSH
F. CLAY BUSH

3000 The Equitable Building
Atlanta, Georgia 30303
525-5903

[56]

(Caption omitted in printing)

[55] Filed: Feb. 12, 1974

MOTION TO STRIKE

Now come DEKALB COUNTY, GEORGIA, A. C. GUHL, WILLIAM A. WILLIAMS, T. M. CALLAWAY, JR., HOKE CLAYTON SMITH [56], ROBERT J. MORRIS, HORIS A. WARD, and W. M. COOLIDGE, some of the defendants in the above-styled action, and move the Court, pursuant to Rule 12, Federal Rules of Civil Procedure, to strike certain allegations from the Complaint, showing the Court as follows:

1.

Defendants move to strike paragraphs 55 of Count One and 2 of Count Two from the Complaint on the grounds that said paragraphs fail to state a claim upon which relief can be granted in that in Georgia, an action will not lie against a county for the alleged creation and or maintenance of nuisance.

2.

Defendants move to strike paragraph 65 (b) from the Complaint on the ground that said paragraph fails to state a claim upon which relief can be granted in that in Georgia, no direct action lies against the insurer of one of the defendants and evidence of such is inadmissible and prejudicial.

3.

Defendants move to strike paragraphs 12, 19, 39, 41, 58, 63, 64, the remaining allegations of 65 and 66 from the plaintiff's Complaint on the grounds that said para-

graphs fail to state a claim upon which relief can be granted in that a county in Georgia is not subject to suit based upon negligence owing to its constitutional governmental immunity which has not been waived, either expressly or impliedly.

4.

Defendants move to strike paragraphs 53 and 54 of Count One and 2 of Count Three from the Complaint on the ground that said paragraph fails to state a claim upon which relief can be granted in the following particulars:

(a) Plaintiff cannot be a third-party beneficiary to the contracts claimed in said paragraphs to have been breached by these defendants since [57] there is no intent in such contracts to confer upon third persons the type of benefits claimed by plaintiff in this action;

(b) Plaintiff cannot recover as a third-party beneficiary for the breach of said contracts on the basis of their Complaint, the allegations of which considered as a whole, clearly fail to allege any breach of contracts;

(c) Plaintiff cannot recover the damages sought as a third-party beneficiary to the contracts because a third-party beneficiary's rights under any contract are no greater than the rights of the parties themselves, and the contracts which plaintiff alleged to have been breached in said paragraphs confer no right on any party to recover the damages sought in the Complaint.

5.

Defendants move to strike paragraphs 61 and 62 from plaintiff's Complaint on the grounds that said paragraphs

fail to state a claim upon which relief can be granted in that the statutes, ordinances, and regulations recited in said paragraphs do not create in plaintiff a cause of action against these defendants.

WHEREFORE, the defendant, DEKALB COUNTY, GEORGIA, A. C. GUHL, WILLIAM A. WILLIAMS, T. M. CALLAWAY, JR., HOKE CLAYTON SMITH, ROBERT J. MORRIS, HORIS A. WARD and W. M. COOLIDGE, pray that their Motion be inquired into and sustained.

(Signature omitted in printing)

NOTE: Portion of Record Omitted
Filed in its Original Form

(Caption omitted in printing)

[128] Filed: March 28, 1974

PLAINTIFF'S FIRST AMENDMENT OF COMPLAINT

Comes now plaintiff and with leave of court first obtained hereby amends its previously filed complaint as follows:

1.

Plaintiff amends paragraph No. 50 of Count One of the complaint by adding at the end of said paragraph the following new sentence: "True, correct, genuine and authentic copy of one of said Grant Agreements referred to in this complaint is attached hereto as Exhibit A and incorporated herein by reference."

2.

Plaintiff amends Count One of the complaint by adding after paragraph No. 58 and before paragraph No. 59 a new paragraph, designated as paragraph No. 58A, and reading as follows:

"58A.

"As the official retained and employed by DeKalb County as the Airport Manager of DeKalb-Peachtree Airport, [129] it was the duty and responsibility of defendant H. F. Manget to operate, manage, maintain and

supervise said Airport in a safe and careful manner. As part of his duties, said defendant had both the power and the responsibility to close said Airport to air traffic when and if conditions unsafe and hazardous to air traffic and aviation existed or prevailed, and to warn and alert aircraft owners and pilots making use of said Airport of any and all conditions unsafe and hazardous to air traffic and aviation, and to take appropriate action to remove or alleviate any and all conditions unsafe and hazardous to air traffic and aviation. At the time of and prior to the airplane crash in question in this case, said defendant had actual, personal knowledge that the open garbage dump adjacent to Runway 20L constituted an attraction to immense flocks of birds, and that the immense flocks of birds attracted to said open garbage dump constituted a serious and acute bird hazard and condition unsafe and hazardous to aviation and air traffic (particularly jet traffic) at said Airport. At and prior to the time of the airplane crash in question, said defendant knew that birds could be ingested into the turbine engines of jet and turbo-prop airplanes operating into and out of said Airport, and that such ingestion of birds could cause engine power losses and airplane crashes. At and prior to the time of the airplane crash in question, said defendant also knew that airplane-bird strikes or collisions could cause damage to airplanes of any type. At and prior to the time of the crash in question said defendant knew that jet aircraft (including Lear Jet aircraft) and various types of turbo-prop aircraft were based at and daily flew into and out of said Airport. At and prior to the time of the airplane crash in question in this case, said defendant knew that there had been several previous mid-air airplane-bird

strikes and collisions within the boundaries of said Airport and near or adjacent to Runway 20L. On the morning of—but prior to—the airplane crash in question, said defendant knew that large flocks of birds had been attracted to the open garbage dump and were located within the airport boundaries in close proximity to Runway [130] 20L. Said defendant also knew that jet and turboprop and other types of air traffic would be using Runway 20L, and that the arrival and departure of such aircraft frequently startled such flocks of birds and caused such flocks of birds to take to the air and to fly across and within the vertical boundaries of Runway 20L. Despite all of this knowledge, said defendant negligently failed to close said Airport, particularly Runway 20L, to jet and turbo-prop traffic, and negligently failed to warn, advise, notify and alert the known jet owners, jet operators and jet pilots at said Airport of the dangerous and unsafe bird hazard that was in existence, and negligently failed to take adequate precautions and safeguards to prevent an airplane-bird strike from occurring. All of such negligence proximately caused or contributed to the airplane crash in question and plaintiff's damages."

3.

Plaintiff amends subparagraph (b) of paragraph No. 65 of Count One of the complaint by striking the figure "$500,000.00" from said subparagraph and by inserting in lieu thereof the figure "$1,000,000.00," and by adding at the very end of said subparagraph the following new sentence: "True, correct, genuine and authentic copy of said insurance policy is attached hereto as Exhibit B and incorporated herein by reference."

4.

Plaintiff amends Count One of the complaint by adding after paragraph No. 65 and before paragraph No. 66 a new paragraph, designated as paragraph No. 65A and reading as follows:

[131] "65A.

"DeKalb County purchased the aforesaid liability insurance policy pursuant to a written bid authorized and approved and let or advertised by DeKalb County to the insurance market or industry. True, correct, genuine and authentic copy of said written bid authorized, approved and let or advertised by DeKalb County is attached hereto as Exhibit C and incorporated herein by reference. Said bid in part provides as follows:

> 'Policy to contain rider "Waiver of Governmental Immunity" as follows: "It is agreed that the company waives any right to deny liability under the policy or to refuse payment within the limits thereof by reason of the non-liability of the insured political subdivision for the wrongful or negligent acts of its agents and employees and its immunity from suit as an agency of the State performing governmental functions." '

As a resulting of authorizing, approving and letting or advertising said written bid containing the aforesaid specification, and as a result of having authorized and approved the purchase of the aforesaid liability insurance policy pursuant to and in accordance with the terms and specifications of said authorized and approved written bid, DeKalb County has either expressly or impliedly waived any defense of governmental or sovereign immunity with respect to the claims of plaintiff herein, at least to the

[131]

extent of the $1,000,000.00 property damage liability protection afforded to DeKalb County in this case under said liability insurance policy."

5.

Plaintiff amends the complaint by adding thereto a new Count, designated as Count Four and reading as follows:

"COUNT FOUR

"As its fourth and alternative claim for relief, plaintiff respectfully shows to the Court the following:

[132] "1.

"Plaintiff incorporates, adopts, repeats and re-alleges herein by reference the allegations of paragraphs numbered 1 through 66 of Count One of the complaint, the allegations of paragraphs numbered 1 through 4 of plaintiff's first amendment of complaint, the allegations of Count Two of the complaint and the allegations of Count Three of the complaint.

"2.

"Article I, Section III, Paragraph I of the 1945 Constitution of the State of Georgia (Georgia Code Section 2-301) provides in pertinent part as follows: 'Private property shall not be taken, *or damaged*, for public purposes, without just and adequate compensation being first paid, . . .' (Emphasis added.)

"3.

"Georgia Code Section 85-1802 provides as follows: 'For *every* violation of a contract express or implied, and for *every* injury done by another to person or property, the law gives a right to recover, and a remedy to enforce it.

[133]

Such a right is a chose in action, and such a remedy is an action or suit at law.' (Emphasis added.)

"4.

"Georgia Code Section 3-105 provides as follows: 'For every right there shall be a remedy, and every court having jurisdiction of the one may, if necessary, frame the other.'

"5.

"As alternative claim for relief, plaintiff shows that if the operation of DeKalb-Peachtree Airport by DeKalb County is a governmental function engaged in for public purposes, or if the construction, maintenance and operation of the open garbage dump by DeKalb County adjacent to Runway 20L is a governmental function engaged in for public [133] purposes, then the airplane accident in question and the destruction of Lear Jet N-454RN proximately resulted from the doing of work by DeKalb County for a public purpose and from the creation and operation by DeKalb County of a public project, without just and adequate compensation for said aircraft damage being first paid, in violation of Article I, Section III, Paragraph I of the 1945 Constitution of the State of Georgia.

"WHEREFORE, plaintiff respectfully prays that process issue as provided by law, requiring the County defendants to appear and answer this complaint, that plaintiff have judgment against all of the County defendants jointly and severally in the sum of $1,000,000.00, plus all costs of Court, and that plaintiff have such other and further relief as the Court deems just and proper."

WHEREFORE, plaintiff respectfully prays that this amendment be inquired into and allowed and ordered filed, and that plaintiff have the relief sought in the complaint as amended.

(Signature omitted in printing)

CERTIFICATE

I, _____, the duly qualified Clerk of the County of DeKalb, Georgia, do hereby certify that the attached extract from the Minutes of the regular _____ Meeting of the Commissioners of Roads & Revenues of DeKalb County, Georgia held on _____, 19 ___, is a true and correct copy of the original minutes of said meeting on file and of record insofar as said original minutes relate to the matters set forth in said attached extract, and I do further certify that the copy of the Resolution appearing in said attached extract is a true and correct copy of such Resolution adopted at said Meeting and on file and of record.

In testimony whereof, I have hereunto set my hand and the seal of said _____, this ___ day of _____, 19 ___.

_____
Clerk
DeKalb County, Georgia

SEAL

Exhibit A
(40 pages)

BEST COPY AVAILABLE

EXTRACT FROM THE MINUTES OF A (REGULAR) (SPECIAL)
MEETING OF THE COMMISSIONERS OF ROADS & REVENUES OF DEKALB COUNTY, GEORGIA
HELD ON _____, 19____

The following Resolution was introduced by _____, seconded by _____, read in full, considered and adopted:

" RESOLUTION ADOPTING AND APPROVING THE EXECUTION OF GRANT AGREEMENT FOR PROJECT NO. 9-09-050-0206 BETWEEN THE UNITED STATES OF AMERICA AND DEKALB COUNTY, GEORGIA.

BE IT RESOLVED, by the Commissioners of Roads and Revenues OF DeKalb County, Georgia:

SECTION 1. That said Commissioners hereby authorizes the execution of Grant Agreement between the Federal Aviation Administration on behalf of the United States of America and the County of DeKalb, Georgia.

SECTION 2. That the Chairman, _____ is hereby authorized and directed to execute said Grant Agreement in quadruplicate on behalf of said DeKalb County, Georgia, and the Clerk, _____ is hereby authorized and directed to impress the official seal of the County of DeKalb, Georgia and to attest said execution.

SECTION 3. That the Grant Agreement referred to hereinabove shall be attached hereto and made a part of this Resolution as though it were fully copied herein.

FEDERAL AVIATION AGENCY
ADMINISTRATION

GRANT AGREEMENT

Part I-Offer

Date of Offer

DEKALB-PEACHTREE Airport
ATLANTA, GEORGIA
Project No. 9-09-050-0206

Contract No. FA-68-80-4532

TO: DeKalb County, Georgia
(herein referred to as the "Sponsor")

FROM: The United States of America (acting through the Federal Aviation Agency, herein referred to as the "FAA")

WHEREAS, the Sponsor has submitted to the FAA a Project Application dated April 5, 1968, for a grant of Federal funds for a project for development of the DeKalb-Peachtree Airport (herein called the "Airport"), together with plans and specifications for such project, which Project Application, as approved by the FAA is hereby incorporated herein and made a part hereof; and

WHEREAS, the FAA has approved a project for development of the Airport (herein called the "Project") consisting of the following-described airport development:

Acquire land for airport development (fee simple title to Tr 235 - 247, inclusive); construct and light portions of runways; extend aprons, including building removal; and relocate wind cone.

all as more particularly described in the property maps and plans and specifications incorporated in the said Project Application;

32 (3-62) USCOMM-DC 27210

NOW THEREFORE, pursuant to and for the purpose of carrying out the provisions of the Federal Airport Act, as amended (49 U.S.C. 1101), and in consideration of (a) the Sponsor's adoption or ratification of the representations and assurances contained in said Project Application, and its acceptance of this Offer as hereinafter provided, and (b) the benefits to accrue to the United States and the public from the accomplishment of the Project and the operation and maintenance of the Airport as hereinafter provided, THE UNITED STATES, HEREBY OFFERS AND AGREES to pay, as the United States share of the allowable costs incurred in accomplishing the Project, 50 percent of all allowable project costs.

This Offer is made on and subject to the following terms and conditions:

1. The maximum obligation of the United States payable under this Offer shall be $ 92,500.

2. The Sponsor shall:

   (a) begin accomplishment of the Project within ninety (90) days after acceptance of this Offer or such longer time as may be prescribed by the FAA, with failure to do so constituting just cause for termination of the obligations of the United States hereunder by the FAA;

   (b) carry out and complete the Project without undue delay and in accordance with the terms hereof, the Federal Airport Act, and Sections 151.45-151.55 of the Regulations of the Federal Aviation Agency (14 CFR 151) in effect as of the date of acceptance of this Offer; which Regulations are hereinafter referred to as the "Regulations";

   (c) carry out and complete the Project in accordance with the plans and specifications and property maps, incorporated herein, as they may be revised or modified with the approval of the FAA.

3. The allowable costs of the project shall not include any costs determined by the FAA to be ineligible for consideration as to allowability under Section 151.47 (a) of the Regulations.

4. Payment of the United States share of the allowable project costs will be made pursuant to and in accordance with the provisions of Sections 151.47-151.51 of the Regulations. Final determination as to the allowability of the costs of the project will be made at the time of the final grant payment pursuant to Section 151.53 of the Regulations, except that, in the event a semi-final grant payment is made pursuant to Section 151.51 of the Regulations, final determination as to the allowability of the costs to which the semi-final payment relates will be made at the time of such semi-final payment.

5. The Sponsor shall operate and maintain the Airport as Provided in the Project Application incorporated herein and specifically covenants and agrees, in accordance with its Assurance 4 in Part III of said Project Application, that in its operation and the operation of all facilities thereof, neither it nor any person or organization occupying space or facilities thereon will discriminate against any person or class of persons by reason of race, color, creed or national origin in the use of any of the facilities provided for the public on the airport.

6. The FAA reserves the right to amend or withdraw this Offer at any time prior to its acceptance by the Sponsor.

7. This Offer shall expire and the United States shall not be obligated to pay any part of the costs of the Project unless this Offer has been accepted by the Sponsor on or before June 15, 1968 or such subsequent date as may be prescribed in writing by the FAA.

8. In addition the sponsor shall:

   (a) Incorporate or cause to be incorporated in each contract for construction work under the project, or any modification thereof, the equal opportunity clause as set forth in Section 202 of Executive Order No. 11246 of September 24, 1965, or such modification thereof as may be approved by the Secretary of Labor.

   (b) Incorporate or cause to be incorporated in all bid or proposal forms submitted by prospective contractors for construction work under the project the provisions prescribed by Section 151.54 (d)(1), Part 151, Federal Aviation Regulations.

   (c) Be bound by said equal opportunity clause in any Federally assisted construction work in which it participates.

   (d) Cooperate actively with the FAA and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor.

   (e) Furnish the FAA and the Secretary of Labor such information as they may require for the supervision of such compliance, and will otherwise assist the FAA in discharging its primary responsibility for securing compliance.

   (f) Refrain from entering into any contract or contract modification subject to Executive Order No. 11246 with a contractor debarred from, or who has not demonstrated eligibility for, government

BEST COPY AVAILABLE

contracts and Federally assisted construction contracts pursuant to Part II, Subpart D of Executive Order No. 11246.

(g) Carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the FAA and the Secretary of Labor pursuant to Part II, Subpart D of Executive Order No. 11246; and in the event that the sponsor fails or refuses to comply with its undertakings, the FAA may cancel, terminate or suspend in whole or in part any contractual arrangement it may have with the sponsor, may refrain from extending any further assistance under any of its programs subject to Executive Order 11246 until satisfactory assurance of future compliance has been received from such applicant, or may refer the case to the Department of Justice for appropriate legal proceedings.

9. The sponsor's financial records of the project, established, maintained and made available to personnel of the FAA in conformity to Section 151.55 of the Regulations of the Federal Aviation Administration (14 CFR 151) will also be available to representatives of the Comptroller General of the United States.

10. It is understood and agreed that the terms "Administrator of the Federal Aviation Administration," "Administrator" or "Federal Aviation Administration" wherever they appear in this Agreement, in the Project Application, plans and specifications or other documents constituting a part of this Agreement shall be deemed to mean the Federal Aviation Administrator or the Federal Aviation Administration as the case may be.

11. Notwithstanding the provision of Paragraph 3, Part III, of the Project Application, the sponsor covenants and agrees that it will not grant or permit any exclusive right forbidden by Section 308(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1349) at the airport, or at any other airport now or hereafter owned or controlled by it. In furtherance of the policy of the FAA under this covenant, the sponsor agrees that, unless authorized by the Administrator, it will not, either directly or indirectly grant or permit any person, firm, or corporation the exclusive right at the airport or at any other airport now or hereafter owned or controlled by it to conduct any aeronautical activities, including, but not limited to, charter flights, pilot training, aircraft rental and sightseeing, photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other aeronautical activity, repair and maintenance of aircraft, sale of aircraft parts, and any other activities which because of their relationship to the operation of aircraft can be regarded as an aeronautical activity. The sponsor further agrees that it will terminate any such exclusive right (including any exclusive right to engage in the sale of gasoline or oil, or both) now existing at the airport, or at any other airport now or hereafter owned or controlled by it, at the earliest renewal, cancellation, or expiration date applicable to the agreement that established the exclusive right, and certifies that there is no exclusive right not subject to termination under this [illegible]

12. It is mutually understood and agreed that no payment of federal funds under this Grant Agreement will be made prior to July 1, 1968.

13. The Federal Government does not now plan or contemplate the construction of any structures pursuant to Paragraph 9 of Part III - Sponsor's Assurances of the Project Application dated April 5, 1968, and therefore it is understood and agreed that the Sponsor is under no obligation to furnish any such areas or rights under this Grant Agreement. However, nothing contained herein shall be construed as altering or changing the rights of the United States and/or the obligations of the Sponsor under prior Grant Agreements to furnish rent-free space for the activities specified in such Agreements.

The Sponsor's acceptance of this Offer and ratification and adoption of the Project Application incorporated herein shall be evidenced by execution of this instrument by the Sponsor, as hereinafter provided, and said Offer and Acceptance shall comprise a Grant Agreement, as provided by the Federal Airport Act, constituting the obligations and rights of the United States and the Sponsor with respect to the accomplishment of the Project and the operation and maintenance of the Airport. Such Grant Agreement shall become effective upon the Sponsor's acceptance of this Offer and shall remain in full force and effect throughout the useful life of the facilities developed under the Project but in any event not to exceed twenty years from the date of said acceptance.

UNITED STATES OF AMERICA
FEDERAL AVIATION AGENCY

By [signature]
(TITLE)
Acting Area Manager

Part II-Acceptance

The Sponsor, DeKalb County, Georgia does hereby ratify and adopt all statements, representations, warranties, covenants, and agreements contained in the Project Application and incorporated materials referred to in the foregoing Offer and does hereby accept said Offer and by such acceptance agrees to all of the terms and conditions thereof.

Executed this day of , 19

DEKALB COUNTY
(Name of Sponsor)

(SEAL)

By [signature]

Title

Attest: [signature]

Title: Clerk

CERTIFICATE OF SPONSOR'S ATTORNEY

I [signature], acting as Attorney for DeKalb County (herein referred to as the "Sponsor") do hereby certify:

That I have examined the foregoing Grant Agreement and the proceedings of the Sponsor relating thereto, and find that the execution thereof by said Sponsor is authorized and that the execution thereof is in all respects duly and properly and in accordance with the laws of the State of Georgia, and further that, in my opinion, said Grant Agreement constitutes a legal and binding obligation of the Sponsor in accordance with the terms thereof.

Dated at Decatur, Ga. this [illegible] day of [illegible], 19[illegible]

Title [illegible]

FAA FORM 1632 (3-62) USE PREVIOUS EDITION

THE FOLLOWING IS A SUMMARY OF THE ESTIMATED COSTS OF THE PROJECT:

ITEM	TOTAL ESTIMATED COST	ESTIMATED SPONSOR'S SHARE OF COST		ESTIMATED FEDERAL SHARE OF COST	
		AMOUNT	PER-CENT	AMOUNT	PER-CENT
1. Land Costs	$473,030	$236,515	50	$236,515	50
2. Construction Costs	None				
3. Engineering and Supervision Costs	9,461				
4. Administrative Costs	9,461				
5. Total of 2, 3, and 4 above	18,922	9,461	50	9,461	50
6. Contingencies	18,000	9,000	50	9,000	50
7. Total All Estimated Project Costs (Items 1, 5, and 6)	$509,952	$254,976		$254,976	

Part II—REPRESENTATIONS

The Sponsor hereby represents and certifies as follows:

1. Legal Authority.—The Sponsor has the legal power and authority: (1) to do all things necessary in order to undertake and carry out the Project in conformity with the Act and the Regulations; (2) to accept, receive, and disburse grants of funds from the United States in aid of the Project, on the terms and conditions stated in the Act and the Regulations; and (3) to carry out all of the provisions of Parts III and IV of this Project Application.

2. Funds.—The Sponsor now has on deposit, or is in a position to secure, $ 254,976 for use in defraying the costs of the Project. The present status of these funds is as follows:

[illegible] General Obligation Bonds [illegible]

[illegible]

3. Approvals. [illegible] approved by all non-Federal agencies whose approval is required, namely:

[illegible]

TO: (1) (SO-7) (MIA-7)x
(2) SO-660

CERTIFICATE OF SUFFICIENCY OF EXECUTION-

AIRPORT		
DeKalb-Peachtree		
CITY	STATE	PROJECT NO.
Atlanta	Georgia	9-09-050-1006

The (Grant Agreement) (Amendment to the Grant Agreement) and Resolution authorizing acceptance and execution for the above project have been examined and the execution of the (Grant Agreement) (Amendment to the Grant Agreement) is legally sufficient.

SIGNATURE OF INDIVIDUAL) (AREA CODE)	OFFICIAL STATUS	ATE

RECEIVED

50 FORM 4100-1 (3-62) (Formerly FAA 7100.1A)

FEDERAL AVIATION AGENCY
ADMINISTRATION

GRANT AGREEMENT

Part 1-Offer

Date of Offer

DEKALB-PEACHTREE Airport
ATLANTA, GEORGIA
Project No. 9-09-050-1006

Contract No. FA-68-SO-1032

TO: DeKalb County, Georgia
(herein referred to as the "Sponsor")

FROM: The United States of America (acting through the Federal Aviation Agency, herein referred to as the "FAA")

WHEREAS, the Sponsor has submitted to the FAA a Project Application dated April 5, 1968, for a grant of Federal funds for a project for development of the DeKalb-Peachtree Airport (herein called the "Airport"), together with plans and specifications for such project, which Project Application, as approved by the FAA is hereby incorporated herein and made a part hereof; and

WHEREAS, the FAA has approved a project for development of the Airport (herein called the "Project") consisting of the following-described airport development:

Acquire land for airport development (fee simple title to Tracts 138 - 147, inclusive); construct, mark and light portions of taxiways; extend aprons, including building removal; and relocate wind cone.

all as more particularly described in the property map and plans and specifications incorporated in the said Project Application;

FAA FORM 1632 (3-62) USE PREVIOUS EDITION

PAGE 1

NOW THEREFORE, pursuant to and for the purpose of carrying out the provisions of the Federal Airport Act, as amended (49 U.S.C. 1101), and in consideration of (a) the Sponsor's adoption and ratification of the representations and assurances contained in said Project Application, and its acceptance of this Offer as hereinafter provided, and (b) the benefits to accrue to the United States and the public from the accomplishment of the Project and the operation and maintenance of the Airport as herein provided, THE FEDERAL AVIATION AGENCY, FOR AND ON BEHALF OF THE UNITED STATES, HEREBY OFFERS AND AGREES to pay, as the United States share of the allowable costs incurred in accomplishing the Project, 50 percent of all allowable project costs.

This Offer is made on and subject to the following terms and conditions:

1. The maximum obligation of the United States payable under this Offer shall be $ 92,500.

2. The Sponsor shall:

   (a) begin accomplishment of the Project within ninety (90) days after acceptance of this Offer or such longer time as may be prescribed by the FAA, with failure to do so constituting just cause for termination of the obligations of the United States hereunder by the FAA;

   (b) carry out and complete the Project without undue delay and in accordance with the terms hereof, the Federal Airport Act, and Sections 151.45-151.55 of the Regulations of the Federal Aviation Agency (14 CFR 151) in effect as of the date of acceptance of this Offer; which Regulations are hereinafter referred to as the "Regulations";

   (c) carry out and complete the Project in accordance with the plans and specifications and property map, incorporated herein, as they may be revised or modified with the approval of the FAA.

3. The allowable costs of the project shall not include any costs determined by the FAA to be ineligible for consideration as to allowability under Section 151.41 (b) of the Regulations.

4. Payment of the United States share of the allowable project costs will be made pursuant to and in accordance with the provisions of Sections 151.57 - 151.63 of the Regulations. Final determination as to the allowability of the costs of the project will be made at the time of the final grant payment pursuant to Section 151.63 of the Regulations: Provided, that, in the event a semi-final grant payment is made pursuant to Section 151.63 of the Regulations, final determination as to the allowability of those costs to which such semi-final payment relates will be made at the time of such semi-final payment.

5. The Sponsor shall operate and maintain the Airport as Provided in the Project Application incorporated herein and specifically covenants and agrees, in accordance with its Assurance 4 in Part III of said Project Application, that in its operation and the operation of all facilities thereof, neither it nor any person or organization occupying space or facilities thereon will discriminate against any person or class of persons by reason of race, color, creed or national origin in the use of any of the facilities provided for the public on the airport.

6. The FAA reserves the right to amend or withdraw this Offer at any time prior to its acceptance by the Sponsor.

7. This Offer shall expire and the United States shall not be obligated to pay any part of the costs of the Project unless this Offer has been accepted by the Sponsor on or before June 15, 1968 or such subsequent date as may be prescribed in writing by the FAA.

8. In addition the sponsor shall:

   (a) Incorporate or cause to be incorporated in each contract for construction work under the project, or any modification thereof, the equal opportunity clause as set forth in Section 202 of Executive Order No. 11246 of September 24, 1965, or such modification thereof as may be approved by the Secretary of Labor.

   (b) Incorporate or cause to be incorporated in each bid or proposal form submitted by prospective contractors for construction work under the project the provisions prescribed by Section 151.54 (d)(1), Part 151, Federal Aviation Regulations.

   (c) Be bound by said equal opportunity clause in any Federally assisted construction work in which it participates.

   (d) Cooperate actively with the FAA and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor.

   (e) Furnish the FAA and the Secretary of Labor such information as they may require for the supervision of such compliance and will otherwise assist the FAA in the discharge of its primary responsibility for securing compliance.

   (f) Refrain from entering into any contract or contract modification subject to Executive Order No. 11246 with a contractor debarred from, or who has not demonstrated eligibility for, government

contracts and Federally assisted construction contracts pursuant to Part II, Subpart D of Executive Order No. 11246.

(g) Carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the FAA and the Secretary of Labor pursuant to Part II, Subpart D of Executive Order No. 11246; and in the event that the Sponsor fails or refuses to comply with its undertakings, the FAA may cancel, terminate or suspend in whole or in part any contractual arrangement it may have with the sponsor, may refrain from extending any further assistance under any of its programs subject to Executive Order 11246 until satisfactory assurance of future compliance has been received from such applicant, or may refer the case to the Department of Justice for appropriate legal proceedings.

9. The sponsor's financial records of the project, established, maintained and made available to personnel of the FAA in conformity to Section 121.45 of the Regulations of the Federal Aviation Administration (14 CFR 121) will also be available to representatives of the Comptroller General of the United States.

10. It is understood and agreed that the terms "Administrator of the Federal Aviation Administration," "Administrator" or "Federal Aviation Administration" wherever they appear in this Agreement, in the Project Application, plans and specifications or other documents constituting a part of this Agreement shall be deemed to mean the Federal Aviation Administrator or the Federal Aviation Administration as the case may be.

11. Notwithstanding the provision of Paragraph 3, Part III, of the Project Application, the sponsor covenants and agrees that it will not grant or permit any exclusive right forbidden by Section 308(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1349) at the airport, or at any other airport now or hereafter owned or controlled by it. In furtherance of the policy of the FAA under this covenant, the sponsor agrees that, unless authorized by the Administrator, it will not, either directly or indirectly, grant or permit any person, firm, or corporation the exclusive right at the airport or at any other airport now or hereafter owned or controlled by it, to conduct any aeronautical activities, including, but not limited to, charter flights, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other aeronautical activity, repair and maintenance of aircraft, sale of aircraft parts, and any other activities which because of their relationship to the operation of aircraft can be regarded as an aeronautical activity. The sponsor further agrees that it will terminate any such exclusive right (including any exclusive right to engage in the sale of gasoline or oil, or both) now existing at the airport, or at any other airport now or hereafter owned or controlled by it, at the earliest renewal, cancellation, or expiration date applicable to the agreement that established the exclusive right, and certifies that there is no exclusive right not subject to termination under this provision."

12. It is mutually understood and agreed that no payment of federal funds under this Grant Agreement will be made prior to July 1, 1968.

13. The Federal Government does not now plan or contemplate the construction of any structures pursuant to Paragraph 9 of Part III - Sponsor's Assurances of the Project Application dated April 9, 1968, and therefore it is understood and agreed that the Sponsor is under no obligation to furnish any such areas or rights under this Grant Agreement. However, nothing contained herein shall be construed as altering or changing the rights of the United States and/or the obligations of the Sponsor under prior Grant Agreements to furnish rent-free space for the activities specified in such Agreements.

The Sponsor's acceptance of this Offer and ratification and adoption of the Project Application incorporated herein shall be evidenced by execution of this instrument by the Sponsor, as hereinafter provided, and said Offer and Acceptance shall comprise a Grant Agreement, as provided by the Federal Airport Act, constituting the obligations and rights of the United States and the Sponsor with respect to the accomplishment of the Project and the operation and maintenance of the Airport. Such Grant Agreement shall become effective upon the Sponsor's acceptance of this Offer and shall remain in full force and effect throughout the useful life of the facilities developed under the Project or for a period not to exceed twenty years from the date of said acceptance.

UNITED STATES OF AMERICA
FEDERAL AVIATION AGENCY

By _____
(TITLE)
Acting Area Manager

Part II-Acceptance

The Sponsor, DeKalb County, Georgia does hereby ratify and adopt all statements, representations, warranties, covenants, and agreements contained in the Project Application and incorporated materials referred to in the foregoing Offer and does hereby accept said Offer and by such acceptance agrees to all of the terms and conditions thereof.

Executed this _____ day of _____, 19__.

DEKALB COUNTY
(Name of Sponsor)

By _____

Title _____

(SEAL)

Attest: _____

Title: Clerk

CERTIFICATE OF SPONSOR'S ATTORNEY

I, Hubert O Edwards, acting as Attorney for DeKalb County (herein referred to as the "Sponsor") do hereby certify:

That I have examined the foregoing Grant Agreement and the proceedings taken by said Sponsor relating thereto, and find that the Acceptance thereof by said Sponsor has been duly authorized and that the execution thereof is in all respects due and proper and in accordance with the laws of the State of Georgia, and further that, in my opinion, said Grant Agreement constitutes a legal and binding obligation of the Sponsor in accordance with the terms thereof.

Dated at Decatur, Ga. this 10th day of May, 1965.

Hubert O Edwards

Title Assistant County Atty.

Form Approved.
Budget Bureau No. 04-R006.4.

UNITED STATES OF AMERICA
FEDERAL AVIATION AGENCY

PROJECT APPLICATION

(For Federal Aid for Development of Public Airports)

Part I–PROJECT INFORMATION

The DeKalb County (herein called the "Sponsor") hereby makes application to the Federal Aviation Agency (hereinafter called the "FAA"), for a grant of Federal funds pursuant to the Federal Airport Act and the Regulations issued thereunder, for the purpose of aiding in financing a project (herein called the "Project") for development of the DeKalb Peachtree Airport (herein called the "Airport") located in DeKalb County State of Georgia.

It is proposed that the Project consist of the following-described airport development:

Construct and light taxiways; extend parking aprons, acquire tracts 13. to 147 inclusive

all as more particularly described on the property map attached (hereto as Exhibit "A")* (as Exhibit "A" to Project Application dated _____ for Project No. _____)*, and in the plans and specifications submitted to the FAA on January 16, 1968 which are made a part hereof.

*Strike out the inappropriate clause.

THE FOLLOWING IS A SUMMARY OF THE ESTIMATED COSTS OF THE PROJECT:

ITEM	TOTAL ESTIMATED COST	ESTIMATED SPONSOR'S SHARE OF COST		ESTIMATED FEDERAL SHARE OF COST	
		AMOUNT	PERCENT	AMOUNT	PERCENT
1. LAND COSTS	37,000	18,500	50	18,500	50
2. CONSTRUCTION COSTS	130,000				
3. ENGINEERING AND SUPERVISION COSTS	13,000				
4. ADMINISTRATIVE COSTS	500				
5. Total of 2, 3, and 4 above	143,500	71,750	50	71,750	50
6. CONTINGENCIES	4,500	2,250	50	2,250	50
7. TOTAL ALL ESTIMATED PROJECT COSTS (Items 1, 5, and 6)	185,000	92,500		92,500	

Part II–REPRESENTATIONS

The Sponsor hereby represents and certifies as follows:

1. **Legal Authority.**—The Sponsor has the legal power and authority: (1) to do all things necessary in order to undertake and carry out the Project in conformity with the Act and the Regulations; (2) to accept, receive, and disburse grants of funds from the United States in aid of the Project, on the terms and conditions stated in the Act and the Regulations; and (3) to carry out all of the provisions of Parts III and IV of this Project Application.

2. **Funds.**—The Sponsor now has on deposit, or is in a position to secure, $ 92,500.00 for use in defraying the costs of the Project. The present status of these funds is as follows:

Airport Construction and Improvement Fund

3. **Compatible Land Use.**—The Sponsor has taken the following actions to assure compatible usage of land adjacent to or in the vicinity of the airport:

Airport Zoning has been passed and approved by the Federal Aviation Administration. Adequate property interests are being acquired in clear zones.

BEST COPY AVAILABLE

4. **Approvals of Other Agencies.**—The Project has been approved by all non-Federal agencies whose approval is required, namely:

See attached letter from Atlanta Region Metropolitan Planning Commission dated March 22, 1968.

5. **Defaults.**—The Sponsor is not in default on any obligation to the United States or any agency of the United States Government relative to the development, operation, or maintenance of any airport, except as stated herewith:

None

6. **Possible Disabilities.**—There are no facts or circumstances (including the existence of effective or proposed leases, use agreements, or other legal instruments affecting use of the Airport or the existence of pending litigation or other legal proceedings) which in reasonable probability might make it impossible for the Sponsor to carry out and complete the Project or carry out the provisions of Parts III and IV of the Project Application, either by limiting its legal or financial ability or otherwise, except as follows:

None

7. **Land.**—(a) The Sponsor holds the following property interest in the following areas of land[1] which are to be developed or used as part of or in connection with the Airport, subject to the following exceptions, encumbrances, and adverse interests, all of which areas are identified on the aforementioned property map designated as Exhibit "A":

Fee Simple Free & Clear: Tracts 1,2,A,B-2 & Parcels C,D,E,F, G,H,J,U,Y2,Y3,I,O,Q,29,30,31,32,34,34A,35,36,143,144,145.

Fee Simple subject to exceptions cleared under previous FAAP Projects: Tract 51.

Easements subject to exceptions cleared under previous FAAP Projects: Tract 3.

The Sponsor further certifies that the above is based on a title examination by a qualified attorney or title company and that such attorney or title company has determined that the Sponsor holds the above property interests.

[1] State character of property interest in each area and list and identify for each all exceptions, encumbrances, and adverse interests of every kind and nature, including liens, easements, leases, etc. The separate areas of land need only be identified here by the area numbers shown on the property map.
(9-64)

(b) The Sponsor will acquire within a reasonable time, but in any event prior to the start of any construction work under the Project, the following property interest in the following areas of land[1] on which such construction work is to be performed, all of which areas are identified on the aforementioned property map designated as Exhibit "A":

None required

(c) The Sponsor will acquire within a reasonable time, and if feasible prior to the completion of all construction work under the Project, the following property interest in the following areas of land[1] which are to be developed or used as part of or in connection with the Airport as it will be upon completion of the Project, all of which areas are identified on the aforementioned property map designated as Exhibit "A":

Satisfactory property interests in tracts 138 to 142 inclusive, 140 and 147

[1]State character of property interest in each area and identify for each all exceptions, encumbrances, and adverse interests of every kind and nature, including liens, easements, leases, etc. The separate areas of land need only be identified here by the area numbers shown on the property map.

Part III—SPONSOR'S ASSURANCES

In order to furnish the assurances required by the Act and Regulations the Sponsor hereby covenants and agrees with the United States, as follows:

1. These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal aid for the Project or any portion thereof, made by the FAA and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed under this Project, but in any event not to exceed twenty (20) years from the date of said acceptance of an offer of Federal aid for the Project.

2. The Sponsor will operate the Airport as such for the use and benefit of the public. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will keep the Airport open to all types, kinds, and classes of aeronautical use without discrimination between such types, kinds, and classes: *Provided*, That the Sponsor may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the Airport as may be necessary for the safe and efficient operation of the Airport; *And Provided Further*, That the Sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the Airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.

3. The Sponsor will not grant or permit any exclusive right for the use of the airport forbidden by Section 308 of the Federal Aviation Act of 1958, and will otherwise comply with all applicable laws. In furtherance of this covenant (but without limiting its general applicability and effect) the Sponsor specifically agrees that, unless authorized by the Administrator, it will not, either directly or indirectly, grant or permit any person, firm, or corporation the exclusive right for the conduct of any aeronautical activities on the Airport, including but not limited to, charter flights, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other aeronautical activity, repair and maintenance of aircraft, sale of aircraft parts, and any other activities which because of their direct relationship to the operation of aircraft can be regarded as an aeronautical activity: *Provided*, That the prohibition against the grant or permit of an exclusive right as set forth herein in no way alters the rights or obligations of the Sponsor under a surplus property instrument of transfer pursuant to which surplus property was conveyed to the Sponsor by the United States pursuant to the *Surplus Property Act of 1944, (61 Stat. 678), as amended.*

4. The Sponsor agrees that it will operate the Airport for the use and benefit of the public, on fair and reasonable terms, and without unjust discrimination. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically covenants and agrees:

a. That in its operation and the operation of all facilities on the airport, neither it nor any person or organization occupying space or facilities thereon will discriminate against any person or class of persons by reason of race, color, creed, or national origin in the use of any of the facilities provided for the public on the Airport.

b. That in any agreement, contract, lease, or other arrangement under which a right or privilege at the Airport is granted to any person, firm, or corporation to render to the public any service (including the furnishing or sale of any aeronautical parts, materials, or supplies) essential to the operation of aircraft at the Airport, the Sponsor will insert and enforce provisions requiring the contractor:

(1) to furnish said service on a fair, equal, and not unjustly discriminatory basis to all users thereof, and

(2) to charge fair, reasonable, and not unjustly discriminatory prices for each unit or service; *Provided*, That the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

c. That it will not exercise or grant any right or privilege which would operate to prevent any person, firm, or corporation operating aircraft on the Airport from performing any services on its own aircraft with its own employees (including, but not limited to maintenance and repair) that it may choose to perform.

d. In the event the Sponsor itself exercises any of the rights and privileges referred to in subsection b, the services involved will be provided on the same conditions as would apply to the furnishing of such services by contractors or concessionaires of the Sponsor under the provisions of such subsection b.

5. Nothing contained herein shall be construed to prohibit the granting or exercise of an exclusive right for the furnishing of nonaviation products and supplies or any service of a nonaeronautical nature or to obligate the Sponsor to furnish any particular nonaeronautical service at the Airport.

6. The Sponsor will operate and maintain in a safe and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes: *Provided*, That nothing contained herein shall be construed to require that the Airport be operated for aeronautical uses during temporary periods when snow, flood, or other climatic conditions interfere with such operation and maintenance; *And Provided Further*, That nothing herein shall be construed as requiring the maintenance, repair, restoration or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the Sponsor.

7. Insofar as it is within its power and reasonably possible, the Sponsor will, either by the acquisition and retention of easements or other interests in or rights for the use of land or airspace or by the adoption and enforcement of zoning regulations, prevent the construction, erection, alteration, or growth of any structure, tree, or other object in the approach areas of the runways of the Airport, which would constitute an obstruction to air navigation according to the criteria or standards prescribed in Section 77.23 of FAA Federal Aviation Regulations Part 77, or Advisory Circular (AC) No. 150/5300-1, whichever is applicable according to the currently approved airport layout plan. In addition, the Sponsor will not erect or permit the erection of any permanent structure or facility which would interfere materially with the use, operation, or future development of the Airport, in any portion of a runway approach area in which the Sponsor has acquired, or may hereafter acquire, property interests permitting it to so control the use made of the surface of the land.

8. All facilities of the Airport developed with Federal aid and all those usable for the landing and taking off of aircraft, will be available to the United States at all times, without charge, for use by military and naval aircraft in common with other aircraft, except that if the use by military and naval aircraft is substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining facilities so used, may be charged. Unless otherwise determined by the FAA, or otherwise agreed to by the Sponsor and the using agency, substantial use of an airport by military and naval aircraft will be considered to exist when operations of such aircraft are in excess of those which, in the opinion of the FAA, would unduly interfere with use of the landing area by other authorized aircraft, or during any calendar month that:

a. Five (5) or more military or naval aircraft are regularly based at the airport or on land adjacent thereto; or

b. The total number of movements (counting each landing as a movement and each takeoff as a movement) of military or naval aircraft is 300 or more, or the gross accumulative weight of military or naval aircraft using the Airport (the total movements of military or naval aircraft multiplied by gross certified weights of such aircraft) is in excess of five million pounds.

9. Whenever so requested by the FAA, the Sponsor will furnish without cost to the Federal Government, for construction, operation and maintenance of facilities for air traffic control activities, or weather reporting activities and communication activities related to air traffic control, such areas of land or water, or estate therein, or rights in buildings of the Sponsor as the FAA may consider necessary or desirable for construction at Federal expense of space or facilities for such purposes. The approximate amounts of areas and the nature of the property interests and/or rights so required will be set forth in the Grant Agreement relating to the Project. Such areas or any portion thereof will be made available as provided herein within 4 months after receipt of written request from the FAA.

10. The Sponsor will furnish the FAA with such annual or special airport financial and operational reports as may be reasonably requested. Such reports may be submitted on forms furnished by the FAA, or may be submitted in such manner as the Sponsor elects so long as the essential data are furnished. The Airport and all airport records and documents affecting the Airport, including deeds, leases, operation and use agreements, regulations, and other instruments, will be made available for inspection by any duly authorized representative of the FAA upon reasonable request. The Sponsor will furnish to the FAA, upon request, a true copy of any such document.

11. The Sponsor will not enter into any transaction which would operate to deprive it of any of the rights and powers necessary to perform any or all of the covenants made herein, unless by such transaction the obligation to perform all such covenants is assumed by another public agency found by the FAA to be eligible under the Act and Regulations to assume such obligations and having the power, authority, and financial resources to carry out all such obligations. If an arrangement is made for management or operation of the Airport by any agency or person other than the Sponsor or an employee of the Sponsor, the Sponsor will reserve sufficient rights and authority to insure that the Airport will be operated and maintained in accordance with the Act, the Regulations, and these covenants.

12. The Sponsor will keep up to date at all times an airport layout plan of the Airport showing (1) the boundaries of the Airport and all proposed additions thereto, together with the boundaries of all offsite areas owned or controlled by the Sponsor for airport purposes, and proposed additions thereto; (2) the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars, and roads), including all proposed extensions and reductions of existing airport facilities, and (3) the location of all existing and proposed nonaviation areas and of all existing improvements thereon. Such airport layout plan, and each amendment, revision, or modification thereof, shall be subject to the approval of the FAA, which approval shall be evidenced by the signature of a duly authorized representative of the FAA on the face of the airport layout plan. The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the FAA, if such changes or alterations might adversely affect the safety, utility, or efficiency of the Airport.

13. Insofar as is within its power and to the extent reasonable, the Sponsor will take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.

14. If at any time it is determined by the FAA that there is any outstanding right or claim of right in or to the Airport property, other than those set forth in Part II, paragraphs 7(a), 7(b), and 7(c), the existence of which creates an undue risk of interference with the operation of the Airport or the performance of the covenants of this Part, the Sponsor will acquire, extinguish, or modify such right or claim of right in a manner acceptable to the FAA.

15. Unless the context otherwise requires, all terms used in these covenants which are defined in the Act and the Regulations shall have the meanings assigned to them therein.

16. Exhibit "B", Sponsor's Assurances of Nondiscrimination, is attached hereto and made a part hereof.

*Section 77.23 as applied to Section 77.27, Part 77 of the Federal Aviation Regulations.

Part IV—PROJECT AGREEMENT

If the Project or any portion thereof is approved by the FAA, and an offer of Federal aid for such approved Project is accepted by the Sponsor, it is understood and agreed that all airport development included in such Project will be accomplished in accordance with the Act and the Regulations, the plans and specifications for such development, as approved by the FAA, and the Grant Agreement with respect to the Project.

IN WITNESS WHEREOF, the Sponsor has caused this Project Application to be duly executed in its name, this 5th day of April, 19 68.

DeKalb County, Georgia
(Name of Sponsor)

By: Prince H. Manning, Jr.
Prince H. Manning, Jr.

Chairman, Board of Commissioners of Roads and Revenues
(Title)

OPINION OF SPONSOR'S ATTORNEY

I HEREBY CERTIFY that all statements of law made in this Project Application and all legal conclusions upon which the representations and covenants contained herein are based, are in my opinion true and correct.

Herbert O. Edwards
~~George D. Dillard~~

Asst DeKalb County Attorney
(Title)

April 5, 1968
(Date)

SPONSOR ASSURANCE TO ACCOMPANY PROJECT APPLICATION DATED April 5, 1968
FOR A GRANT OF AID FOR THE DEVELOPMENT OR IMPROVEMENT OF THE
DeKalb Peachtree AIRPORT

Nondiscrimination in Federally-Assisted Programs of the FAA. In order to furnish the assurances required by Title VI of the Civil Rights Act of 1964, and by Part 15 of the Federal Aviation Regulations, as amended, the DeKalb County, Georgia (hereinafter called the "Sponsor") hereby covenants and agrees with the United States (hereinafter called the "Government") as follows:

The Sponsor in the operation and use of the DeKalb Peachtree Airport, will not on the grounds of race, color, or national origin discriminate or permit discrimination against any person or group of persons in any manner prohibited by Part 15 of the Federal Aviation Regulations.

The Sponsor will include, or require the inclusion of, the foregoing covenant in every agreement or concession pursuant to which any person or persons, other than the Sponsor, operates or has the right to operate any facility on the Airport providing services to the public, and a provision granting the Sponsor the right to take such action as the Government may direct to enforce such covenant.

Noncompliance with the above assurances shall constitute a material breach, and in the event of such noncompliance the Government may take appropriate action to enforce compliance, may terminate the Grant Agreement to which this covenant relates, or seek judicial enforcement.

The covenant shall become effective upon execution of a Grant Agreement pursuant to the above identified project application and shall constitute a part of the Grant Agreement to which it relates and shall remain in full force and effect so long as the airport covered by such Grant Agreement continues to be used and operated as a public airport.

DeKalb County, Georgia
(Name of Sponsor)

By: _____

April 5, 1968
(Date)

Title Brince H. Manning, Jr.
Chairman, Board of Commissioners
of Roads and Revenues

(Name of Sponsor)

By _____

(Date)

Title _____

SD FORM 5100-2 (7-66)

COMMENTS AND RECOMMENDATIONS
OF
STATE, METROPOLITAN OR REGIONAL PLANNING AGENCIES

DATE: March 22, 1968

Planning Agency:

Name Atlanta Region Metropolitan Planning Commission

Address 900 Glenn Building, Atlanta, Georgia 30303

Source of Authority for Establishment of Agency Georgia Laws, 1960 - Ga. Law 847

Grant Applicant:

Name DeKalb County

Address DeKalb Building, Decatur, Georgia 30030

Project Description: Project No.FAA 9-09-050-06

Paving of taxiways and aircraft parking areas at DeKalb-Peacntree Airport.

Certification:

The project described above does (X) does not ( ) conform with the comprehensive plan developed or in process of development for the metropolitan area in which it is located.

Comments and Recommendations:

In accordance with criteria for review and comment accepted by the ARMPC and dated April 26, 1967, the following response is indicated by the planning agency:

1. Project is consistent with regional air facility plan.
2. Project is consistent with local plans.
3. There is specific regional priority for the project. Project is consistent with airport development schedule.

(Signature)
Authorized Representative of Planning Agency

Form approved
Budget Bureau No. 61-R0066.1

UNITED STATES OF AMERICA
FEDERAL AVIATION AGENCY

PROJECT APPLICATION

(For Federal Aid for Development of Public Airports)

Part I–PROJECT INFORMATION

The DeKalb County, Georgia (herein called the "Sponsor") hereby makes application to the Federal Aviation Agency (hereinafter called the "FAA"), for a grant of Federal funds pursuant to the Federal Airport Act and the Regulations issued thereunder, for the purpose of aiding in financing a project (herein called the "Project") for development of the DeKalb-Peachtree Airport (herein called the "Airport") located in DeKalb County, State of Georgia.

It is proposed that the Project consist of the following-described airport development:

Acquire property interests in partial clear zone, SW end of NE-SW Runway, and land between extended center lines of Runways 16 and 20, and in land (partial clear zone for Runway 27) along east boundary of airport.

Acquire fee simple title to these properties described as: Land A (Item 1); Land B-1, B-2, B-3 (Item 2), and Parcels J, K, L, M, N, P and R (Item 3) on Exhibit "A".

all as more particularly described on the property map attached (hereto as Exhibit "A")* ~~(as Exhibit "A" to Project Application dated _____ for Project No. _____)~~*, and in the plans and specifications submitted to the FAA on 16 March 1962 (Rev. 4/30/62) which are made a part hereof.

*Strike out the inappropriate clause.

Form 7460-1(2-61) OBSOLETE PREVIOUS EDITION

THE FOLLOWING IS A SUMMARY OF THE ESTIMATED COSTS OF THE PROJECT:

ITEM	TOTAL ESTIMATED COST	ESTIMATED SPONSOR'S SHARE OF COST		ESTIMATED FEDERAL SHARE OF COST	
		AMOUNT	PER-CENT	AMOUNT	PER-CENT
1. LAND COSTS	$558,592	$279,296	50	$279,296	50
2. CONSTRUCTION COSTS	None				
3. ENGINEERING AND SUPERVISION COSTS	11,172				
4. ADMINISTRATIVE COSTS	11,172				
5. Total of 2, 3, and 4 above	22,344	11,172	50	11,172	50
6. CONTINGENCIES	33,516	16,758	50	16,758	50
7. TOTAL ALL ESTIMATED PROJECT COSTS (Items 1, 5, and 6)	$614,452	$307,226		$307,226	

Part II–REPRESENTATIONS

The Sponsor hereby represents and certifies as follows:

1. **Legal Authority.**–The Sponsor has the legal power and authority: (1) to do all things necessary in order to undertake and carry out the Project in conformity with the Act and the Regulations; (2) to accept, receive, and disburse grants of funds from the United States in aid of the Project, on the terms and conditions stated in the Act and the Regulations; and (3) to carry out all of the provisions of Parts III and IV of this Project Application.

2. **Funds.**–The Sponsor now has on deposit, or is in a position to secure, $ ~~307,226~~ for use in defraying the costs of the Project. The present status of these funds is as follows:

General Obligation Bonds

3. **Approvals of Other Agencies.**–The Project has been approved by all non-Federal agencies whose approval is required, namely:

None Required

4. **Defaults.**—The Sponsor is not in default on any obligation to the United States or any agency of the United States Government relative to the development, operation, or maintenance of any airport, except as stated herewith:

No Exception

5. **Possible Disabilities.**—There are no facts or circumstances (including the existence of effective or proposed leases, use agreements, or other legal instruments affecting use of the Airport or the existence of pending litigation or other legal proceedings) which in reasonable probability might make it impossible for the Sponsor to carry out and complete the Project or carry out the provisions of Parts III and IV of the Project Application, either by limiting its legal or financial ability or otherwise, except as follows:

None

6. **Land.**—The Sponsor holds the following property interests in the following areas of land which are to be developed or used as part of or in connection with the Airport, subject to the following exceptions, encumbrances, and adverse interests, all of which areas[1] are identified on the aforementioned property map designated as Exhibit "A":

See report of Lawyers Title Insurance Company of Richmond, Virginia, dated March 14, 1962, No. BRD-32,139, attached hereto as Exhibit "D"

See Title Examination by Attorney Robert E. Mozley, dated June 5, 1963, attached hereto as Exhibit "C".

The Sponsor further certifies that the above is based on a title examination by a qualified attorney or title company and that such attorney or title company has determined that the Sponsor holds the above property interests.

[1] State character of property interest in each area and list and identify, for each all exceptions, encumbrances, and adverse interests of every kind and nature, including liens, easements, leases, etc. The separate areas of land need only be identified here by the area numbers shown on the property map.

Form 5AA-1621(1-62) OBSOLETE PREVIOUS EDITION

Part III—SPONSOR'S ASSURANCES

In order to furnish the assurances required by the Act and Regulations the Sponsor hereby covenants and agrees with the United States, as follows:

1. These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal aid for the Project or any portion thereof, made by the FAA, and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed under this Project, but in any event not to exceed twenty (20) years from the date of said acceptance of an offer of Federal aid for the Project.

2. The Sponsor will operate the Airport as such for the use and benefit of the public. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will keep the Airport open to all types, kinds, and classes of aeronautical use without discrimination between such types, kinds, and classes: *Provided*, That the Sponsor may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the Airport as may be necessary for the safe and efficient operation of the Airport: *And Provided Further*, That the Sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the Airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.

3. The Sponsor will not exercise, grant, or permit any exclusive right for the use of the Airport forbidden by Section 308 of the Federal Aviation Act of 1958. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will not either directly or indirectly exercise, or grant to any person, firm or corporation, or permit any person, firm, or corporation to exercise any exclusive right for the use of the Airport for commercial flight operations, including air carrier transportation, rental of aircraft, conduct of charter flights, operation of flight schools, or the carrying on of any other service or operation requiring the use of aircraft.

4. The Sponsor agrees that it will operate the Airport for the use and benefit of the public, on fair and reasonable terms, and without unjust discrimination. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically covenants and agrees:

a. That in any agreement, contract, lease, or other arrangement under which a right or privilege at the Airport is granted to any person, firm, or corporation to render to the public any service (including the furnishing or sale of any aeronautical parts, materials, or supplies) essential to the operation of aircraft at the Airport, the Sponsor will insert and enforce provisions requiring the contractor:

(1) to furnish said service on a fair, equal, and not unjustly discriminatory basis to all users thereof, and

(2) to charge fair, reasonable, and not unjustly discriminatory prices for each unit or service: *Provided*, That the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

b. That it will not exercise or grant any right or privilege which would operate to prevent any person, firm, or corporation operating aircraft on the Airport from performing any services on its own aircraft with its own employees (including, but not limited to, maintenance and repair) that it may choose to perform.

c. In the event the Sponsor itself exercises any of the rights and privileges referred to in subsection *a*, the services involved will be provided on the same conditions as would apply to the furnishing of such services by contractors or concessionaires of the Sponsor under the provisions of such subsection *a*.

5. Nothing contained herein shall be construed to prohibit the granting or exercise of an exclusive right for the furnishing of nonaviation products and supplies or any service of a nonaeronautical nature or to obligate the Sponsor to furnish any particular nonaeronautical service at the Airport.

6. The Sponsor will operate and maintain in a safe and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes: *Provided*, That nothing contained herein shall be construed to require that the Airport be operated for aeronautical uses during temporary periods when snow, flood, or other climatic conditions interfere with such operation and maintenance; *And Provided Further*, That nothing herein shall be construed as requiring the maintenance, repair, restoration or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the Sponsor.

7. Insofar as it is within its powers and reasonably possible, the Sponsor will, either by the acquisition and retention of easements or other interests in or rights for the use of land or airspace or by the adoption and enforcement of zoning regulations, prevent the construction, erection, alteration, or growth of any structure, tree or other object in the approach areas of the runways of the Airport, which would constitute an obstruction to air navigation according to the criteria or standards prescribed in Section A of FAA Technical Standard Order No. N18, dated April 26, 1950, as amended. In addition, the Sponsor will not erect or permit the erection of any permanent structure or facility which would interfere materially with the use, operation, or future development of the Airport, in any portion of a runway approach area in which the Sponsor has acquired, or may hereafter acquire, property interests permitting it to so control the use made of the surface of the land.

8. All facilities of the Airport developed with Federal aid, and all those usable for the landing and taking-off of aircraft, will be available to the United States at all times, without charge, for use by military and naval aircraft in common with other aircraft, except that if the use by military and naval aircraft is substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining facilities so used, may be charged. Unless otherwise determined by the FAA, or otherwise agreed to by the Sponsor and the using agency, substantial use of an airport by military and naval aircraft will be considered to exist when operations of such aircraft are in excess of those which, in the opinion of the FAA, would unduly interfere with use of the landing area by other authorized aircraft, or during any calendar month that:

a. Five (5) or more military or naval aircraft are regularly based at the airport or on land adjacent thereto; or

b. The total number of movements (counting each landing as a movement and each take-off as a movement) of military or naval aircraft is 300 or more, or the gross accumulative weight of military or naval aircraft using the Airport (the total movements of military or naval aircraft multiplied by gross certified weights of such aircraft) is in excess of five million pounds.

9. Whenever so requested by the FAA, the Sponsor will furnish without cost to the Federal Government, for construction, operation and maintenance of facilities for air traffic control activities, or weather-reporting activities and communication activities related to air traffic control, such areas of land or water, or estate therein, or rights in buildings of the Sponsor as the FAA may consider necessary or desirable for construction at Federal expense of space or facilities for such purposes. The approximate amounts of areas and the nature of the property interests and/or rights so required will be set forth in the Grant Agreement relating to the Project. Such areas or any portion thereof will be made available as provided herein within four months after receipt of written request from the FAA.

10. The Sponsor will furnish the FAA with such annual or special airport financial and operational reports as may be reasonably requested. Such reports may be submitted on forms furnished by the FAA, or may be submitted in such manner as the Sponsor elects so long as the essential data are furnished. The Airport and all airport records and documents affecting the Airport, including deeds, leases, operation and use agreements, regulations, and other instruments, will be made available for inspection by any duly authorized representative of the FAA upon reasonable request. The Sponsor will furnish to the FAA, upon request, a true copy of any such document.

11. The Sponsor will not enter into any transaction which would operate to deprive it of any of the rights and powers necessary to perform any or all of the covenants made herein, unless by such transaction the obligation to perform all such covenants is assumed by another public agency found by the FAA to be eligible under the Act and the Regulations to assume such obligations and having the power, authority, and financial resources to carry out all such obligations. If an arrangement is made for management or operation of the Airport by any agency or person other than the Sponsor or an employee of the Sponsor, the Sponsor will reserve sufficient rights and authority to insure that the Airport will be operated and maintained in accordance with the Act, the Regulations, and these covenants.

12. The Sponsor will keep up to date at all times a master plan layout of the Airport showing: (1) the boundaries of the Airport and of all proposed additions thereto, together with the boundaries of all offsite areas owned or controlled by the Sponsor for airport purposes, and proposed additions thereto; (2) the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars, and roads), including all proposed extensions and reductions of existing airport facilities; and (3) the location of all existing and proposed nonaviation areas and of all existing improvements thereon. Such master plan layout, and each amendment, revision, or modification

Part IV–PROJECT AGREEMENT

If the Project or any portion thereof is approved by the FAA, and an offer of Federal aid for such approved Project is accepted by the Sponsor, it is understood and agreed that all airport development included in such Project will be accomplished in accordance with the Act and the Regulations, the plans and specifications for such development, as approved by the FAA, and the Grant Agreement with respect to the Project.

IN WITNESS WHEREOF, the Sponsor has caused this Project Application to be duly executed in its name, this 13th day of June, 19 63

DeKalb County, Georgia
(Name of Sponsor)

By C. O. Emmerich
C. O. Emmerich
Chairman, DeKalb County
Board of Commissioners
of Roads and Revenues

OPINION OF SPONSOR'S ATTORNEY

I HEREBY CERTIFY that all statements of law made in this Project Application and all legal conclusions upon which the representations and covenants contained herein are based, are in my opinion true and correct.

George P. Dillard

DeKalb County Attorney
(Title)

13 June 1963
(Date)

A.E.D.O.
ATLANTA, GA.

Form approved
Budget Bureau No. 65-R005.1

UNITED STATES OF AMERICA
FEDERAL AVIATION AGENCY

PROJECT APPLICATION

(For Federal Aid for Development of Public Airports)

Part I–PROJECT INFORMATION

The DeKalb County, Georgia (herein called the "Sponsor") hereby makes application to the Federal Aviation Agency (hereinafter called the "FAA"), for a grant of Federal funds pursuant to the Federal Airport Act and the Regulations issued thereunder, for the purpose of aiding in financing a project (herein called the "Project") for development of the DeKalb-Peachtree Airport (herein called the "Airport") located in DeKalb County
State of Georgia

It is proposed that the Project consist of the following-described airport development:

Acquire property interests in partial clear zone, SW end of NE-SW runway, and land between extended centerlines of Runways 16 and 20, and in land (partial clear zone for Runway 27) along East boundary of airport.

Acquire fee simple title to these properties described as: Tract A (Item 1); Tracts B-1, B-2, B-3 (Item 2); and Tracts J, K, L, M, N, P and R (Item 3) on Exhibit "A".

all as more particularly described on the property map attached (hereto as Exhibit "A") ~~(as Exhibit "A" to Project Application dated _____ for Project No. _____)~~, and in the plans and specifications submitted ~~to the FAA~~ which are ~~annexed thereto~~.

*Strike out the inapplicable clause.

Form FAA-1624(1-62) OBSOLETE PREVIOUS EDITION

BEST COPY AVAILABLE

THE FOLLOWING IS A SUMMARY OF THE ESTIMATED COSTS OF THE PROJECT:

ITEM	TOTAL ESTIMATED COST	ESTIMATED SPONSOR'S SHARE OF COST		ESTIMATED FEDERAL SHARE OF COST	
		AMOUNT	PERCENT	AMOUNT	PERCENT
1. LAND COSTS	568,092	284,046	50	284,046	50
2. CONSTRUCTION COSTS	-				
3. ENGINEERING AND SUPERVISION COSTS	9,508				
4. ADMINISTRATIVE COSTS	-				
5. Total of 2, 3, and 4 above	9,508	4,754	50	4,754	50
6. CONTINGENCIES	18,400	9,200	50	9,200	50
7. TOTAL ALL ESTIMATED PROJECT COSTS (Items 1, 5, and 6)	596,000	298,000		298,000	

Part II—REPRESENTATIONS

The Sponsor hereby represents and certifies as follows:

1. **Legal Authority.**—The Sponsor has the legal power and authority: (1) to do all things necessary in order to undertake and carry out the Project in conformity with the Act and the Regulations; (2) to accept, receive, and disburse grants of funds from the United States in aid of the Project, on the terms and conditions stated in the Act and the Regulations; and (3) to carry out all of the provisions of Parts III and IV of this Project Application.

2. **Funds.**—The Sponsor now has on deposit, or is in a position to secure, $ 298,000 for use in defraying the costs of the Project. The present status of these funds is as follows:

General Obligation Bonds

3. **Approvals of Other Agencies.**—The Project has been approved by all non-Federal agencies whose approval is required, namely:

None required.

4. **Defaults.**—The Sponsor is not in default on any obligation to the United States or any agency of the United States Government relative to the development, operation, or maintenance of any airport, except as stated herewith:

None

5. **Possible Disabilities.**—There are no facts or circumstances (including the existence of effective or proposed leases, use agreements, or other legal instruments affecting use of the Airport or the existence of pending litigation or other legal proceedings) which in reasonable probability might make it impossible for the Sponsor to carry out and complete the Project or carry out the provisions of Parts III and IV of the Project Application, either by limiting its legal or financial ability or otherwise, except as follows:

None

6. **Land.**—The Sponsor holds the following property interests in the following areas of land which are to be developed or used as part of or in connection with the Airport, subject to the following exceptions, encumbrances, and adverse interests, all of which areas[1] are identified on the aforementioned property map designated as Exhibit "A":

Tract No. 1 free and clear of reversionary interests except those contained in a Quitclaim Deed by and between the United States of America and DeKalb County, Georgia, dated February 15, 1960.

Tract No. 2 free and clear of all reversionary interests except those contained in a Quitclaim Deed dated March 27, 1961.

Fee simple title to Tracts C, D, E, F, G and H; Tracts A and B-1.

The Sponsor further certifies that the above is based on a title examination by a qualified attorney or title company and that such attorney or title company has determined that the Sponsor holds the above property interests.

[1] State character of property interest in each area and list and identify by each all encumbrances, and adverse interests of every kind and nature, including liens, easements, leases, etc. The separate areas of land need only be identified here by the area numbers shown on the property map.

Part III—SPONSOR'S ASSURANCES

In order to furnish the assurances required by the Act and Regulations the Sponsor hereby covenants and agrees with the United States, as follows:

1. These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal aid for the Project or any portion thereof, made by the FAA, and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed under this Project, but in any event not to exceed twenty (20) years from the date of said acceptance of an offer of Federal aid for the Project.

2. The Sponsor will operate the Airport as such for the use and benefit of the public. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will keep the Airport open to all types, kinds, and classes of aeronautical use without discrimination between such types, kinds, and classes: *Provided*, That the Sponsor may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the Airport as may be necessary for the safe and efficient operation of the Airport: *And Provided Further*, That the Sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the Airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.

3. The Sponsor will not exercise, grant, or permit any exclusive right for the use of the Airport forbidden by Section 308 of the Federal Aviation Act of 1958. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will not either directly or indirectly exercise, or grant to any person, firm or corporation, or permit any person, firm, or corporation to exercise any exclusive right for the use of the Airport for commercial flight operations, including air carrier transportation, rental of aircraft, conduct of charter flights, operation of flight schools, or the carrying on of any other service or operation requiring the use of aircraft.

4. The Sponsor agrees that it will operate the Airport for the use and benefit of the public, on fair and reasonable terms, and without unjust discrimination. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically covenants and agrees:

a. That in any agreement, contract, lease, or other arrangement under which a right or privilege at the Airport is granted to any person, firm, or corporation to render to the public any service (including the furnishing or sale of any aeronautical parts, materials, or supplies) essential to the operation of aircraft at the Airport, the Sponsor will insert and enforce provisions requiring the contractor:

(1) to furnish said service on a fair, equal, and not unjustly discriminatory basis to all users thereof, and

(2) to charge fair, reasonable, and not unjustly discriminatory prices for each unit or service: *Provided*, That the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

b. That it will not exercise or grant any right or privilege which would operate to prevent any person, firm, or corporation operating aircraft on the Airport from performing any services on its own aircraft with its own employees (including, but not limited to, maintenance and repair) that it may choose to perform.

c. In the event the Sponsor itself exercises any of the rights and privileges referred to in subsection *a*, the services involved will be provided on the same conditions as would apply to the furnishing of such services by contractors or concessionaires of the Sponsor under the provisions of such subsection *a*.

5. Nothing contained herein shall be construed to prohibit the granting or exercise of an exclusive right for the furnishing of nonaviation products and supplies or any service of a nonaeronautical nature or to obligate the Sponsor to furnish any particular nonaeronautical service at the Airport.

6. The Sponsor will operate and maintain in a safe and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes: *Provided*, That nothing contained herein shall be construed to require that the Airport be operated for aeronautical uses during temporary periods when snow, flood, or other climatic conditions interfere with such operation and maintenance; *And Provided Further*, That nothing herein shall be construed as requiring the maintenance, repair, restoration or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the Sponsor.

7. Insofar as it is within its powers and reasonably possible, the Sponsor will, either by the acquisition and retention of easements or other interests in or rights for the use of land or airspace or by the adoption and enforcement of zoning regulations, prevent the construction, erection, alteration, or growth of any structure, tree or other object in the approach areas of the runways of the Airport, which would constitute an obstruction to air navigation according to the criteria or standards prescribed in Section A of FAA Technical Standard Order No. N18, dated April 26, 1950), as amended. In addition, the Sponsor will not erect or permit the erection of any permanent structure or facility which would interfere materially with the use, operation, or future development of the Airport, in any portion of a runway approach area in which the Sponsor has acquired, or may hereafter acquire, property interests permitting it to so control the use made of the surface of the land.

8. All facilities of the Airport developed with Federal aid, and all those usable for the landing and taking-off of aircraft, will be available to the United States at all times, without charge, for use by military and naval aircraft in common with other aircraft, except that if the use by military and naval aircraft is substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining facilities so used, may be charged. Unless otherwise determined by the FAA, or otherwise agreed to by the Sponsor and the using agency, substantial use of an airport by military and naval aircraft will be considered to exist when operations of such aircraft are in excess of those which, in the opinion of the FAA, would unduly interfere with use of the landing area by other authorized aircraft, or during any calendar month that:

a. Five (5) or more military or naval aircraft are regularly based at the airport or on land adjacent thereto; or

b. The total number of movements (counting each landing as a movement and each take-off as a movement) of military or naval aircraft is 300 or more, or the gross accumulative weight of military or naval aircraft using the Airport (the total movements of military or naval aircraft multiplied by gross certified weights of such aircraft) is in excess of five million pounds.

9. Whenever so requested by the FAA, the Sponsor will furnish without cost to the Federal Government, for construction, operation and maintenance of facilities for air traffic control activities, or weather-reporting activities and communication activities related to air traffic control, such areas of land or water, or estate therein, or rights in buildings of the Sponsor as the FAA may consider necessary or desirable for construction at Federal expense of space or facilities for such purposes. The approximate amounts of areas and the nature of the property interests and/or rights so required will be set forth in the Grant Agreement relating to the Project. Such areas or any portion thereof will be made available as provided herein within four months after receipt of written request from the FAA.

10. The Sponsor will furnish the FAA with such annual or special airport financial and operational reports as may be reasonably requested. Such reports may be submitted on forms furnished by the FAA, or may be submitted in such manner as the Sponsor elects so long as the essential data are furnished. The Airport and all airport records and documents affecting the Airport, including deeds, leases, operation and use agreements, regulations, and other instruments, will be made available for inspection by any duly authorized representative of the FAA upon reasonable request. The Sponsor will furnish to the FAA, upon request, a true copy of any such document.

11. The Sponsor will not enter into any transaction which would operate to deprive it of any of the rights and powers necessary to perform any or all of the covenants made herein, unless by such transaction the obligation to perform all such covenants is assumed by another public agency found by the FAA to be eligible under the Act and the Regulations to assume such obligations and having the power, authority, and financial resources to carry out all such obligations. If an arrangement is made for management or operation of the Airport by any agency or person other than the Sponsor or an employee of the Sponsor, the Sponsor will reserve sufficient rights and authority to insure that the Airport will be operated and maintained in accordance with the Act, the Regulations, and these covenants.

12. The Sponsor will keep up to date at all times a master plan layout of the Airport showing: (1) the boundaries of the Airport and of all proposed additions thereto, together with the boundaries of all offsite areas owned or controlled by the Sponsor for airport purposes, and proposed additions thereto; (2) the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars, and roads), including all proposed extensions and reductions of existing airport facilities; and (3) the location of all existing and proposed nonaviation areas and of all existing improvements thereon. Such master plan layout, and each amendment, revision, or modification

thereof, shall be subject to the approval of the FAA, which approval shall be evidenced by the signature of a duly authorized representative of the FAA on the face of the master plan layout. The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the master plan layout as so approved by the FAA, if such changes or alterations might adversely affect the safety, utility, or efficiency of the Airport.

13. (*a*) The Sponsor will acquire within a reasonable time, but in any event prior to the start of any construction work under the Project, the following property interests in the following areas of land [1] on which such construction work is to be performed, all of which areas are identified on the property map which is attached hereto and identified as Exhibit "A":

None

(*b*) The Sponsor will acquire within a reasonable time, and if feasible prior to the completion of all construction work under the Project, the following property interests in the following areas of land [1] which are to be developed or used as part of or in connection with the Airport as it will be upon completion of the Project, all of which areas are identified on the property map which is attached hereto and identified as Exhibit "A":

Tracts B-2, B-3, J, K, L, M, N, P and R.

14. If at any time it is determined by the FAA that there is any outstanding right or claim of right in or to the Airport property, other than those set forth in paragraph 6 of Part II and paragraphs 13(*a*) and 13(*b*) of this Part, the existence of which creates an undue risk of interference with the operation of the Airport or the performance of the covenants of this Part, the Sponsor will acquire, extinguish, or modify said right or claim of right in a manner acceptable to the FAA.

15. Unless the context otherwise requires, all terms used in these covenants which are defined in the Act and the Regulations shall have the meanings assigned to them therein.

[1] State clearly nature of property not to be acquired in each area and list and identify for each all easements, rights-of-way, and other interests in property to be acquired and nature of building items, construction, leases, etc. The separate areas of land may be identified here by the area numbers shown on the property map.

Part IV–PROJECT AGREEMENT

If the Project or any portion thereof is approved by the FAA, and an offer of Federal aid for such approved Project is accepted by the Sponsor, it is understood and agreed that all airport development included in such Project will be accomplished in accordance with the Act and the Regulations, the plans and specifications for such development, as approved by the FAA, and the Grant Agreement with respect to the Project.

IN WITNESS WHEREOF, the Sponsor has caused this Project Application to be duly executed in its name, this 13th day of June, 19 63.

DeKalb County, Georgia
(Name of Sponsor)

By _____

Vice-Chairman, DeKalb County
Board of Commissioners of
Roads and Revenues

OPINION OF SPONSOR'S ATTORNEY

I HEREBY CERTIFY that all statements of law made in this Project Application and all legal conclusions upon which the representations and covenants contained herein are based, are in my opinion true and correct.

RECEIVED
JUL 1 1963
A.D.D.O.
ATLANTA, GA.

_____

Asst.
DeKalb County Attorney
(Title)

June 13, 1963
(Date)

AMERICAN HOME ASSURANCE COMPANY
NEW YORK, NEW YORK

AVIATION LIABILITY POLICY
Issued through
WESTMINSTER
INSURANCE MANAGERS, INC.
275 FOREST AVENUE
PARAMUS, NEW JERSEY 07652
TELEPHONE AREA CODE 201 265-4515
WESTERN UNION TELEX 13-4328

PLEASE READ YOUR POLICY

IN EVENT OF ACCIDENT

et named ate first aid for all injured parties.

rotect the aircraft whether the loss is insured or not.

ive no statements to anyone except police officers, .A.A. officials (or other government officials having isdiction over civil aviation) and your Insurance Cem- any representative.

4. Secure all possible information including names and addresses of those involved and witnesses.

5. Report all accidents to Westminster Insurance Managers, Inc. promptly. If FONLY INJURY is involved Telex or Telephone and follow with written report.

"In no, to an ever greater extent than the sea, is terribly unforgiving of any carelessness, incapacity or neglect".

AMERICAN HOME ASSURANCE COMPANY
NEW YORK, NEW YORK
(A stock company, hereinafter called the company)

In consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy to which insurance only with respect to such and to the following coverages as are indicated by specific premium charge or charges as set forth in the declarations.

Insuring Agreements

over Coverages Defined:
ability. To pay on behalf of the insured all sums which the insured shall gally be obliged to pay as damages because of:

A — Bodily Injury sustained by any person except a passenger;

B — Property Damage, injury to property of others

C — Passenger, injury sustained by any passenger;

D — Single Limit, injury sustained by any person and injury to property of others

E — Single Limit, injury sustained by any person, except a passenger and injury to property of others,

ing out of, occurrence and arising out of the ownership, maintenance or use of ft,

F — Medical Coverage. To pay all reasonable expenses incurred within from the date of accident, for necessary medical, surgical, dental, ambu- lance, hospital, professional nursing and funeral services to or for each passenger who sustains injury caused by accident, sustained by such passenger while insured or while he is passenger in, boarding or alighting from the aircraft, or while operating, or after operation of the aircraft, unless "Excess" is expressly stipu- lated to not apply in the Declarations.

Hull Coverages — To pay for direct loss of or damage to the aircraft, subject to the exclusions, conditions and other terms of this policy which control for:

Coverage G — All Risks of Physical Loss or Damage to the Aircraft. The aircraft shall be presumed lost if flight of aircraft while insured and is not thereafter seen or heard from or communication received within sixty days thereafter.

Coverage H — All Risks of physical loss or damage to the aircraft while not in motion.

Coverage I — All Risks of physical loss or damage to the aircraft while not in flight.

Coverage J — As endorsed hereon.

ective on August 23, 19 63 attached to and forming part of Policy No. _____

To American Home Assurance Company

Insured Board of Commissioners of the Road County

Westminster
Insurance Agency, Inc.
For the Company

745 Ind. No. ____ Page 1

I. Defense, Settlement, Supplementary Payments (Coverages A, B, C, D and E). As respects such insurance as is afforded by this policy with respect to the ownership, maintenance or use of aircraft, the company shall defend any suit against the insured seeking damages on account of such bodily injury, sickness or death or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient. In addition, the company will pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such suit, all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon. Coverage by the insured, as the need of bodily injury liability or damage to property may arise, and the company's duty to defend any suit against the insured for the purpose of such coverage, shall cease when the limit of such liability has been exhausted by payment of judgments or settlements.

The company agrees to pay the amounts incurred as for this insuring agreement, all settlements of claims and suits, in addition to the applicable limit of liability of this policy.

II. Definition of "Insured" (Coverages A, B, C, D, E and F). The unqualified word "insured" wherever used in this policy includes not only the named insured but also any person while using the aircraft and any person or organization legally responsible for the use thereof, provided the actual use is with the permission of the named insured. The insurance afforded by the provisions of this paragraph II does not apply: (a) to any person or organization with respect to bodily injury, sickness, disease or death of any person who is a named insured, or to any employee or official of an insured with respect to bodily injury, sickness, disease or death of another employee of the same insured incurred in the course of such employment or to property owned or transported by or in the charge of any named insured or of the employer of such named insured or, if the named insured is a partnership, of any partner thereof, or to property rented to or in charge of any named insured or of the employer of such named insured or, if the named insured is a partnership, of any partner thereof, or to property rented to or in charge of any such employer, other than property customarily used in the ownership, maintenance or use of aircraft or ground equipment thereof; (b) to any aircraft or aircraft part or property, other than (1) aircraft owned by the named insured or (2) aircraft not owned by the named insured while in the sole charge, custody or control of the named insured or any employee of the named insured, or (3) aircraft owned by an employee of the named insured provided such aircraft is not used in the business of such named insured; (c) to any aircraft while used in any race, contest, exhibition or speed test, or any preparation therefor, or while used for the purpose of parachute jumping; (d) to any aircraft while used for any purpose other than those permitted by the certificate of airworthiness issued by the Federal Aviation Agency or by the government of the country in which such aircraft is registered; (e) to any aircraft while used for any unlawful purpose; (f) to any aircraft while operated in any race, contest or speed test, or any practice or preparation for any of the foregoing, unless specifically endorsed hereon; (g) to any aircraft while used for the carriage of persons or property for compensation or hire, or for any instruction for which the insured receives compensation, unless specifically endorsed hereon; (h) to any aircraft while used for any purpose in connection with the sale, lease, repair, storage, testing, demonstration or delivery of aircraft owned by the insured or held by the insured for sale or lease; (i) to any aircraft while used for any purpose in connection with the manufacture, assembly or distribution of aircraft by the insured; (j) to any aircraft while used for the purpose of crop dusting, seeding, spraying or bird chasing, or any form of fumigation or application of chemicals or other substances; (k) to any aircraft while used for the purpose of fire fighting, fire patrol or fire control; (l) to any aircraft while used for the purpose of search and rescue operations; (m) to any aircraft while used for the purpose of aerial surveying, photography, exploration, geophysical prospecting or mineral development; (n) to any aircraft while used for the purpose of pipeline location or examination; (o) to any aircraft while used for the purpose of forest fire, wildlife or game conservation or management; (p) to any aircraft while used for the purpose of glider towing or banner towing; (q) to any aircraft while used for the purpose of pilot training; (r) to any aircraft while used for the purpose of testing for any of the purposes listed in (c) through (q) above; (s) to any aircraft while used for the purpose of any operation not listed in (c) through (q) above which is hazardous to persons or property on the ground; (t) to any aircraft while used for the purpose of any operation not listed in (c) through (q) above which is hazardous to persons or property on the ground; (u) to any aircraft while used for the purpose of any operation not listed in (c) through (q) above which is hazardous to persons or property on the ground; (v) to any aircraft while used for the purpose of any operation not listed in (c) through (q) above which is hazardous to persons or property on the ground; (w) to any aircraft while used for the purpose of any operation not listed in (c) through (q) above which is hazardous to persons or property on the ground; (x) to any aircraft while used for the purpose of any operation not listed in (c) through (q) above which is hazardous to persons or property on the ground; (y) to any aircraft while used for the purpose of any operation not listed in (c) through (q) above which is hazardous to persons or property on the ground; (z) to any aircraft while used for the purpose of any operation not listed in (c) through (q) above which is hazardous to persons or property on the ground.

III. Use of Other Aircraft (Pleasure and Business or Industrial Aid Uses Only—Coverages A, B, C, D, E and F). Such insurance as is afforded by this policy with respect to the aircraft applies to the named insured if an individual and the owner of such aircraft with respect to the operation of any other aircraft of similar type, horsepower and seating capacity by such named insured or with consent of the owner of such aircraft, provided such other aircraft is not owned by, furnished or hired for the regular use of, or regularly available to the named insured or any resident of the household of the named insured. This insuring agreement shall not apply: (a) to any aircraft owned or hired by the named insured or any employee of the named insured, or (b) to any aircraft while used in the business of the named insured, or (c) to any aircraft while used in any race, contest, exhibition or speed test, or any preparation therefor, or (d) to any aircraft while used for the purpose of parachute jumping, or (e) to any aircraft while used for the purpose of crop dusting, seeding, spraying or bird chasing, or any form of fumigation or application of chemicals or other substances, or (f) to any aircraft while used for the purpose of fire fighting, fire patrol or fire control, or (g) to any aircraft while used for the purpose of search and rescue operations, or (h) to any aircraft while used for the purpose of aerial surveying, photography, exploration, geophysical prospecting or mineral development, or (i) to any aircraft while used for the purpose of pipeline location or examination, or (j) to any aircraft while used for the purpose of forest fire, wildlife or game conservation or management, or (k) to any aircraft while used for the purpose of glider towing or banner towing, or (l) to any aircraft while used for the purpose of pilot training, or (m) to any aircraft while used for the purpose of testing for any of the purposes listed in (c) through (l) above, or (n) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (o) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (p) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (q) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (r) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (s) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (t) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (u) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (v) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (w) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (x) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (y) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (z) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground.

IV. Use of Other Aircraft (Pleasure and Business or Industrial Aid Uses Only—Coverages A, B, C, D, E and F). Such insurance as is afforded by this policy with respect to the aircraft applies to the named insured if an individual and the owner of such aircraft with respect to the operation of any other aircraft of similar type, horsepower and seating capacity by such named insured or with consent of the owner of such aircraft, provided such other aircraft is not owned by, furnished or hired for the regular use of, or regularly available to the named insured or any resident of the household of the named insured. This insuring agreement shall not apply: (a) to any aircraft owned or hired by the named insured or any employee of the named insured, or (b) to any aircraft while used in the business of the named insured, or (c) to any aircraft while used in any race, contest, exhibition or speed test, or any preparation therefor, or (d) to any aircraft while used for the purpose of parachute jumping, or (e) to any aircraft while used for the purpose of crop dusting, seeding, spraying or bird chasing, or any form of fumigation or application of chemicals or other substances, or (f) to any aircraft while used for the purpose of fire fighting, fire patrol or fire control, or (g) to any aircraft while used for the purpose of search and rescue operations, or (h) to any aircraft while used for the purpose of aerial surveying, photography, exploration, geophysical prospecting or mineral development, or (i) to any aircraft while used for the purpose of pipeline location or examination, or (j) to any aircraft while used for the purpose of forest fire, wildlife or game conservation or management, or (k) to any aircraft while used for the purpose of glider towing or banner towing, or (l) to any aircraft while used for the purpose of pilot training, or (m) to any aircraft while used for the purpose of testing for any of the purposes listed in (c) through (l) above, or (n) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (o) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (p) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (q) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (r) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (s) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (t) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (u) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (v) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (w) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (x) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (y) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground, or (z) to any aircraft while used for the purpose of any operation not listed in (c) through (l) above which is hazardous to persons or property on the ground.

V. Temporary Use of Substitute Aircraft (Coverages A, B, C, D, E and F). While an aircraft owned by the named insured is withdrawn from use because of its breakdown, repair, servicing, loss or destruction, such insurance as is afforded by this policy with respect to such aircraft applies with respect to any substitute aircraft of similar type, horsepower and seating capacity not owned by the named insured or by the substitute aircraft or any agent or employee of such owners.

VI. Automatic Insurance for Newly Acquired Aircraft (Pleasure and Business or Industrial Aid Uses Only) Liability, Medical and Hull Coverages A, B, C, D, E, F, G, H and I). If the named insured who is the owner of the aircraft acquires ownership of another aircraft of similar type, horsepower and seating capacity and notifies the company within ten days following the date of its delivery to him, such insurance as is afforded by this policy applies also to such aircraft as of such delivery date, but if a registered or licensed aircraft is involved, only to the extent the insurance is applicable to the replaced aircraft, or (b) if it is an additional aircraft and if the company insures all aircraft owned by the named insured at such delivery date.

Unless otherwise agreed in writing between the named insured or the Company, the Coverages Limits of Liability and Amount of Insurance for such newly acquired aircraft shall be as follows:

(a) Liability and Medical Coverages—not to exceed the limits originally provided for any owned aircraft,

(b) Hull Coverages—the actual cost of the aircraft to the named insured, but not to exceed the highest amount of insurance on any described aircraft and subject to the same deductibles.

This insuring agreement does not apply: (a) to any loss against which the named insured has other valid and collectible insurance, or (b) except during the ferry period, but if such delivery date is prior to the effective date of this policy, the insurance applies as of such effective date.

The named insured shall pay any additional premium required because of the application of the insurance to such other aircraft. The insurance terminates upon a replaced aircraft on the delivery time and date.

VII. Occurrences, Policy Period, Territory, Purpose of Use. This policy applies only to occurrences during the policy period while the aircraft is within the United States of America (excluding Alaska), Canada, or the Republic of Mexico, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated on applicable therein.

Exclusions

This policy does not apply:

A. to bodily injury, sickness, disease or death of any employee of the insured while engaged in the duties of his employment or to any obligation for which the insured or any company as his insurer may be held liable under any Workmen's Compensation law;

B. to liability assumed by the insured under any contract or agreement;

C. while, with the knowledge and consent of the insured—

(a) the aircraft is being operated by an operator not properly certificated by the Federal Aviation Agency with respect to the type and limitations of the Federal Aviation Agency Standard Airworthiness Certificate;

(b) the aircraft is being used for any unlawful purpose; or

(c) the aircraft is being operated in any race, contest or speed test, or any practice or preparation for any of the foregoing, unless specifically endorsed hereon;

D. to property owned by the insured, to property rented to, used by, or in the care, custody or control of the insured or any employee of the insured, or to property transported by the insured, except (1) property (other than cargo) carried in or upon or attached to the aircraft, or (2) property (other than cargo) carried in or upon or attached to any automobile not owned by the insured while such property is being transported solely for the purpose of ground movement of the aircraft to or from the premises on which the aircraft is hangared, maintained or stored;

E. to property damage arising out of the use of the aircraft by the insured in any business or employment, other than (1) the operation of the aircraft by the insured solely for pleasure or personal transportation, (2) the operation of the aircraft by the insured in the business of aerial photography, exploration, geophysical prospecting, mineral development, pipeline location or examination, forest fire, wildlife or game conservation or management, flying club or the manufacture of aircraft, aircraft engines or aircraft accessories;

F. (None)

(a) to loss or damage or any liability of the insured resulting from, caused by, arising out of, or any way connected with hostile acts, warlike action, insurrection, rebellion, revolution, civil war, usurped power, or any action taken to hinder or defend against any of these, regardless of whether such loss or damage or liability is caused directly or indirectly by using of any weapon employing atomic energy or by or on behalf of any person acting for any political faction, and regardless of any other cause or event contributing concurrently or in any sequence to such loss or damage or liability. The word "hostile" includes offensive, but does not imply any particular degree of organized violence,

(b) the liability of the Company arising out of any agreement entered into by or on behalf of the insured and assumed by the Company under the terms of the Policy shall not exclude any liability in respect of claims or suits for damages because of bodily injury or property damage caused by any of the perils excluded in paragraph (a),

(c) with respect to any provision in the Policy conferring or delegating to the Company or related adjusters such powers, duties or discretions, the Company shall not be required to defend:

(i) damages not actually against the insured and

(ii) defense fees and expenses incurred by the insured.

G. Other Policies

H. Other Risks

I. Limitation of Liability

...ment: Board of Commissioners for Co. for the County Court

...ed: the Hale County Commissioners, Incorporated, municipality Deed

...cy Period: From 12:01 A.M. ☐ P.M. August 6, 1972 To August 6, 1973

...t of Insured: Municipality

...ft Insured at

Insurable Interest:

LIABILITY COVERAGES	LIMITS OF LIABILITY: Each Person	LIMITS OF LIABILITY: Each Occurrence	LIABILITY PREMIUMS	HULL COVERAGES IDENTIFIED BY:
Liability (except Passengers)	$	$	$	G. All Risks
Property Damage	XXXX			H. All Risks not in motion
Passengers				I. All Risks not in flight
Medical Payments XXXX	XXXX	XXXX		J. As endorsed
Hull: ☐ Comp. ☐ Coll. ☐ Fire ☐ Theft			1500.	
Aircraft Spares No. 1	2,200			DEDUCTIBLES Exp. Aircraft Fire Loss Except Fire, Wind, Lightning, and Explosion.
The limit of liability for any one Passenger shall not exceed	$	Total Premium	$ 1500.	

DESCRIPTION OF AIRCRAFT or HULL COV. [illegible]

Make and Model	F.A.A. Registration Number	Long Plane Speed Vc Safety Vc	Years Model	Original Model Cost or Cost Age	Amount of Insurance	Hull Premium	Not In Motion	In Motion
Does Not Apply					$	$	$	$ -

F.A.A. Category: [ ] Normal [ ] Restricted — Breach of Warranty Premium — ** Undisclosed Deductible

F.A.A. Class: [ ] Utility [ ] Aerobatic [ ] Standard [ ] Transport [ ] Limited [ ] Experimental — **$ — Hull Premium $ — Policy Premium $ 1500.

Deductible applies to each loss from Collision, Cyclone, Tornado, Hail, Sleet, Snow or Theft unless otherwise specifically designated in these spaces.

Does Not Apply

Remarks, if any (use reverse)

In consideration, as charged by the undersigned, as stated by the insured to the company, pertaining to the operation and use of the insured aircraft as stated above, the insured and the undersigned hereby are fully covered by the aircraft policy conditions stated on Items A and B above, if a premium is indicated for coverage A and B above, less, if any, similar coverages C, D, E and F shall be payable to the insured named and to such mortgagee named as may appear.

Broker: Fairfax Underwriters Services, Inc. 127 N. 10th St., Kansas City, Mo.

Accepted by _____ _____

Rev. 4-72 (Kans.) — See Reverse side for Policy Conditions — Form Continued

Liability Insurance

SECTION I PREMISES — Operations

Location (Premises Number, Street, City, County and State)	Part Occupied by Insured	Limits of Liability Bodily Injury Each Person	Limits of Liability Bodily Injury Each Occurrence
	Lessee	$ 250.	$ 500.

SECTION II PRODUCTS

Classification	Estimated Sales	Rate Per $1000 of Sales (Bodily Injury and Property Damage Combined)	Advance Premium
	$	$	$

Rate — B.I. $ _____ P.D. $ _____ Single Limit $ _____

SECTION III CONTRACTUAL — Description of Contract

Rate Bodily Injury	Rate Property Damage	Advance Premium
		$

Rate Limited P.D. $

SECTION IV ALTERATIONS — Description

Rate Bodily Injury	Rate Property Damage	Advance Premium
		$

Rate Protective Limit — P.D. $

SECTION V HANGARKEEPERS LEGAL LIABILITY

	Per Peril Each Aircraft	Per Peril Any One Loss
	X X X	$

Rate Of Liability Any One Aircraft $ _____ Any One Loss $ _____

Exposure Hangarage

Including Taxes ☐ Excluding Taxes Deductible Each Aircraft, Each Loss $ _____

Advance Premium	Sect. I	Sect. II	Sect. III	Sect. IV	TOTAL ADVANCE PREMIUM
For Injury	$ 250.	$	$	$	$
To Property Damage	$	$	$	$	$ 250.
Limit	$	$	$	$	

This endorsement, including all provisions and stipulations set forth herein, is attached to and forms part of Policy No. _____

effective _____ 19 _____ at 12 o'clock noon Standard Time at the place covered by said Policy and is subject to all the terms and conditions of said Policy except as herein provided.

Attached to and forming part of Policy No. _____ issued by _____ County

to _____

of Insured _____ Address _____

Countersigned

Insurance Agency, Inc.

By _____

Authorized Agent

A 9-65

[illegible]

[illegible]

[illegible]

"Limit of Contribution of Political Subdivision"

dorsement, effective August 6, 1973 (12:01 A.M., standard time, at the address of the insured) forms a part of policy No. 21033

ider- ☐ Additional Premium } of $ .ill for days
☐ Return Premium } in of $

ely Understood and Agreed that:

The premium for the policy is due and payable as follows:

August 6, 1973 $500.
August 6, 1974 $500.
August 6, 1975 $500.

Waiver of Governmental Immunity

"It is agreed that the company waives any right to deny liability under the policy or to refuse payment within the limits thereof by reason of exemption-liability of the insured political subdivision for the wrongful or negligent acts of its agents and employees and its immunity from suit as an agency of the State performing governmental function."

the following pages, if any, are a part of this endorsement. All other terms and conditions of unchanged.

Westminster Insurance Managers, Inc.

For the Company

End. No. 2 Page 1

BEST COPY AVAILABLE

issued to [illegible]

This endorsement, effective [illegible] forms a part of policy No. 21033
(12:01 A.M., standard time, at the address of the insured)

In Consideration of ☐ Additional Premium ☐ Return Premium } of $ ..... for days
in of $

It is hereby Understood and Agreed that:

Policy Renewal

This policy is subject to automatic notice of cancellation to take effect upon anniversary date (s).

provisions of the following pages, if any, are a part of this endorsement. All other terms and conditions of policy remain unchanged.

Westminster Insurance Managers, Inc.

For the Company

End. No. 2 Page 2

6-65

INVITATION TO BID AND SEALED PROPOSAL

Address Proposals To:
DEKALB COUNTY
DEPARTMENT OF PURCHASING
ROOM 406A DEKALB COUNTY COURTHOUSE, DECATUR, GEORGIA 30031

INVITATION NO. 148-72
DATE ISSUED June 20, 1972
Publication Date June 22, 19 72

For information contact J. P. Wade, Purchasing Agent — 371-2611 Bids must be submitted in original only.

Sealed proposals for furnishing the supplies or services described in the following schedule will be received in the bid opening Room 406A DeKalb County Courthouse, Decatur, Georgia 30031 until 3:00 P. M. on July 13, 19 72 and at that time publicly opened. All proposals are subject to the following:

1. The Schedule included below and/or attached hereto.
2. Such other provisions, representations, certifications, and specifications as are attached hereto or incorporated by reference in the Schedule.
3. Specifications
4. Notice to Bidders (Purchasing Form #17)

DELIVERY F. O. B.:

SCHEDULE

ITEM NO.	SUPPLIES OR SERVICES	(Number of Units)	UNIT	UNIT PRICE	AMOUNT
	The Board of Commissioners of DeKalb County will accept bids for liability insurance on DeKalb-Peachtree Airport located at Chamblee, Georgia. Information for making proposal can be secured from the Director of Finance, Room 903, DeKalb County Courthouse, Decatur, Georgia. Telephone 371-2741. Proposals should be submitted to: Department of Purchasing (Insurance), Room 406A, DeKalb County Courthouse, Decatur, Georgia, until 3:00 P.M. on July 13, 1972. Page 1 (Continued on Page 2)				

CAUTION: READ ALL INSTRUCTIONS, CONDITIONS, SPECIFICATIONS, ETC IN DETAIL.

In compliance with the above, the undersigned offers and agrees, if this Bid be accepted within sixty calendar days from the date of opening, to furnish any or all of the items upon which prices are quoted, at the price set opposite each item, delivered at the designated point (s) within the time specified in the Schedule.

Bidder will indicate time payment discount.

NAME AND ADDRESS OF BIDDER (Street, City, State and Zip Code. Type or print)	SIGNATURE OF PERSON AUTHORIZED TO SIGN BID	DATE OF BID
	SIGNER'S NAME AND TITLE (Type or Print)	
AREA CODE AND TELEPHONE NO.		

Purchasing Form #17

NOTICE TO BIDDERS

THIS IS TO BE SIGNED AND RETURNED WITH YOUR BID.

The enclosed (or attached) bid in response to Invitation No. 148-72 is a firm offer, as defined by Section 109A-2-205 of the Code of Georgia (Georgia Laws 1962 pages 156-178), by the undersigned bidder. This offer shall remain open for acceptance for a period of 60 days from the date of the opening of the bids, as set out in the invitation for bids. The terms, conditions, and other limitations of the invitation for bids are accepted.

NAME AND ADDRESS OF BIDDER (Street, City, State & Zip Code. Type or print)	SIGNATURE OF PERSON AUTHORIZED TO SIGN BID	DATE SIGNED
	SIGNER'S NAME AND TITLE (Type or print)	
AREA CODE AND TELEPHONE NO.		

Invitation No. 148-72

ITEM NO. PREMIUM

1. State amount to be charged for Coverage A - Bodily Injury excluding passengers $100,000.00 each person, $1,000,000.00 each accident, in accordance with attached Specifications. $_____

2. State amount to be charged for Coverage B - Property Damage, $1,000,000.00 each accident, in accordance with attached Specifications. $_____

Total Premium $_____

I. Bidder must check applicable blank below:

Bidder affirms he meets exactly specifications:

Yes_____ No_____

II. ANY DEVIATION FROM SPECIFICATIONS MUST BE COMPLETELY EXPLAINED BY BIDDER.

Bidder will explain exact particulars where his bid does not meet exactly the specifications if "No" is checked above.

_____

_____

III. Bidder will state below the claim facilities available to the County.

_____

_____

_____

Invitation No. 148-72

IV. Bidder will state below the address of the Claims Office to which claim reports are to be directed.

_____

_____

_____

V. Bidder will state name of company below:

_____

VI. Bidder will state below name of Agent and License Number.

_____

VII. The bidder is required to examine carefully the specifications and to investigate all hazards or potential risks to be covered. Any and all statements or declarations made by the County in writing or otherwise shall not be considered expressed or implie but are merely afforded for the information of the insurance company and should be verified by the company.

VIII. NOTE: PLEASE BID ON THIS FORM ONLY.

IX. The County reserves the right to accept, or reject or require modifications to any proposal submitted, and to readvertise.

[187]

Invitation No. 148-72

SPECIFICATIONS

DeKalb County does not own or operate any aircraft. DeKalb County does not handle any operational, repairing, ground or flight testing or refueling of aircraft.

Policy to contain rider "Waiver of Governmental Immunity"as follows: "It is agreed that the company waives any right to deny liability under the policy or to refuse payment within the limits thereof by reason of the non-liability of the insured political subdivision for the wrongful or negligent acts of" its agents and employees and its immunity from suit as an agency of the State performing governmental functions."

No claims during past nine years.

Period of coverage will be three years commencing August 6, 1972.

Only proposal by companies with rating of A and AAA or better and licensed to do business in the State of Georgia and represented by licensed agents will be considered.

[198]

NOTE: Portion of Record Omitted
Filed in its Original Form

(Caption omitted in printing)

[197] Filed: May 6, 1974

MOTION TO DISMISS THE AMENDED COMPLAINT

Now comes DEKALB COUNTY, GEORGIA, and the Chairman and Members of the Board of Commissioners of Roads and Revenues of DeKalb County, some of the Defendants in the above-styled action, and move the Court, pursuant to Rule 12, Federal Rules of Civil Procedure, for the dismissal of the amended Complaint, showing the Court as follows:

1.

The amended Complaint fails to state a claim or cause of action against DeKalb County, Georgia, upon which relief can be granted, for the reasons enumerated in the original Motion to Dismiss filed on behalf of these Defendants.

2.

More particularly, DeKalb County, Georgia, shows the Court that Count Four of the amended Complaint fails to state a claim or cause of action upon which relief can be granted in the following respects:

[198]

(a) The Constitution of the State of Georgia does not grant in Plaintiff the right of recovery from these Defendants for damage to personal property;

(b) The Plaintiff has no standing to assert the constitutional rights and privileges of another.

WHEREFORE, Defendants DEKALB COUNTY, GEORGIA, and the Chairman and Members of the Board of Commissioners of Roads and Revenues of DeKalb County, pray that their Motion be inquired into and sustained and that the amended Complaint be dismissed as to them.

(Signature omitted in printing)

(Caption omitted in printing)

[200] Filed: May 6, 1974

MOTION TO STRIKE THE AMENDED COMPLAINT

Now comes DEKALB COUNTY, GEORGIA, and the Chairman and Members of the Board of Commissioners of Roads and Revenues of DeKalb County, some of the Defendants in the above-styled action, and move the Court, pursuant to Rule 12, Federal Rules of Civil Procedure, to strike certain allegations from the Complaint, showing the Court as follows:

1.

These Defendants move to strike Paragraphs 65 (b) and 65 (A) of Count One of the Complaint and amended Complaint on the ground that said Paragraphs fail to state a claim upon which relief can be granted in that in Georgia, no direct action lies against the insurer of one of the Defendants and evidence of such is inadmissible and prejudicial.

2.

These Defendants move to strike Paragraph 5 of Count Four of the Complaint and amended Complaint on the ground that said Paragraph [201] fails to state a claim upon which relief can be granted in that Article I, Section 3, Paragraph 1 of the 1945 Constitution of the State of Georgia (Georgia Code Annotated Section 2-301) does not grant in Plaintiff the right of recovery from these Defendants for damage to personal property and that Plaintiff has no standing to assert the constitutional rights and privileges of another.

WHEREFORE, Defendants DEKALB COUNTY, GEORGIA, and the Chairman and Members of the Board of Commissioners of Roads and Revenues of DeKalb County, pray that their Motion be inquired into and sustained.

(Signature omitted in printing)

PAGE D
APPENDIX
IN
NO. 76-722

WILLIAM MICHAEL FIELDS,
Petitioner,

v.

DEKALB COUNTY, GEORGIA, *et al.*,
Respondents.

PLAINTIFFS | DEFENDANTS

[illegible] FILED

U.S. [illegible]

9/25/[illegible]

10/21/74 [illegible]

ATTORNEYS

Robert H. Pretzel
Robert H. Tweed
Powell, Goldstein, Frazer & Murphy
1100 C&S National Bank Building
Atlanta, Georgia 30303

Herbert S. Falk, Jr.
Falk, Carruthers & Roth
P. O. Box 510
Greensboro, N. C. 27402

Joe C. Freeman, Jr.
~~Neely, Freeman & Hawkins~~
Fulton Federal Bldg.
Atlanta, Georgia 30303
524-0856

For deft U.S.A.:
John [illegible]
William Willard, Asst. [illegible]
and
George M. Fleming
Trial Attorney
Torts Section, Civil Division
Department of Justice
Washington, D.C. 20530 (202/72[illegible]

CAUSE 28 USC §1332 & 1346(b)-Breach of contract

UNITED STATES OF AMERICA
Deft. & 3rd party plff.
-vs-
MACHINERY BUYERS CORP. and
SOUTHEAST MACHINERY, INC.

Wendell K. Willard
Harvey, Willard & Elliott
125 Trinity Place
Decatur, Ga.
Meade Burns
F: Clay Bush
Long, Weinberg, Ansley & Wheeler
3000 Equitable Bldg.
Atlanta, Ga. 525-5903
for all defts. except U.S.A.
Smith, Cohen, Pingel, Kohler, Martin
J. Arthur Mozley
2400 First National Bank Tower
Atlanta, Georgia 30303 658-1200
(Machinery Buyers Corp. & Southeast Machinery, Inc.)

[illegible] fee $15.00
Marshal $65.82
" $6.00 4/23/74 ajb
" $5.16 5/22/74

FILING FEES PAID			JURY DEMAND
DATE	RECEIPT NUMBER	C.D. NUMBER	DEFT. USA [illegible]
FEB 20 1974	[illegible]	[illegible]	PLAIN. [illegible]
OCT - 4 1974	[illegible]	[illegible]	DATE [illegible]
			STATISTICAL CARD
			CARD DATE MAIL
			JS5 [illegible]
			JS6

CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS

U.S. DISTRICT COURT DOCKET

BEST COPY AVAILABLE

DATE 1974	PROCEEDINGS
Feb. 20	Complaint with attachments and NOV cover sheet.
	Summons issued & delivered to U. S. Marshal.
25	ORDER APPOINTING Harry Gentry as agent of this Court to serve process in th action on deft. Commissioners of Roads & Revenues of Dekalb County, filed. C. furn.
27	Affidavit of Harry Gentry of service on deft. Commissioners of Roads & Revenues of Dekalb County by service on certain parties on 2-25-74, filed.
March 7	Marshal's return of service as to: John W. Stokes and William A. Williams executed on 2/21/74, as to Horace A. Ward, AC Guhl and Thomas Callaway executed on 2/22/74, as to Robert J. Morris executed on 2/23/74, as to American Home Assurance Company executed on 3/5/74 and as to H.F. Manget, Jr., executed on 3/6/74; service as to William M. Cooledge and Hoke Clayton Smith picked up by agent H.C. Gentry, of Powell & Goldstein on 2/25/74, filed.
12	Consent Order ext. time thru April 9 deft. to file pleadings, including answer, counterclaims or any cross claims, filed. cc; counsel
13	Deft. U.S.' Motion to consolidate with brief in support and proposed order, filed.
19	Consent order extending time thru March 28, 1974 for pltf. to defts. motion to consolidate, filed.
25	Consent order extending time thru April 9 for deft. to file any and all defensive pleadings et al, filed. copies furn.
28	Pltf's brief in opposition to motion of Deft. U.S. to consolidate, filed.
APRIL 2	First interrogs propounded by the deft USA, to pltf., filed
6	SUBMITTED ON DEFT U.S.' MOTION TO CONSOLIDATE & ORDER OF 3/19/74
9	Consent Order by Clerk extending time thru 4-15-74 for defts. Dekalb Co., Ga., H. F. Manget, Jr. & American Home Assurance Co. to answer, etc., filed. C. furn. WCO
12	ANSWER and CROSS-CLAIMS of deft U.S.A., filed. To WCO.
	Deft U.S.A.'s first request to produce & permit inspection & copying addressed to pltf, filed. To WCO.
	3rd PARTY COMPLAINT, filed. To WCO
	Summons issued & delivered to U.S. Marshal on 3rd party complaint
15	Dekalb County, A. C. Guhl, William A. Williams, T. M. Callaway, Jr., Hoke Clayton Smith, Robert J. Morris, Horis A. Ward and W. M. Coolidge motion to dismiss, filed. WCO
	Dekalb county, A. C. Guhl, T. M. Callaway, Jr., Hoke C. Smith Robert J. Morris, Horis A. Ward and W. M. Coolidge's motion to dismiss, filed. WCO
	Breif in support of above motions to dismiss and to strike, filed.
	Motion of American Home Assurance Co. to strike and dismiss with brief, filed. WCO
	ANSWER & JURY DEMAND OF H. F. Manget, filed. WCO
	ANSWER & JURY DEMANDOOF Dekalb County, Ga. and the Chairman and members of the Board of Commissioners of Roads and Revenues of Dekalb county, filed. WCO
	ANSWER & JURY DEMAND OF American Home Assurance Company, filed. WCO
16	Amendment to ANSWER of American Home Assurance Company, filed WCO
23	Marshal's return of service as to Machinery Buyers Corp. and Southeast Machinery, Inc. both executed on 4/18/74, filed.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT
WILLIAM MICHAEL FIELDS	C.O.R., Dekalb County, Ga., A.C. Guhl, William A. Williams, Thomas Callaway, Hoke Clayton Smith, et al

DATE 1974	PROCEEDINGS
Apr. 25	Consent Order by Clerk extending time thru 5-6-74 for pltf. to respond to deft. American Home Assurance Co's motion to strike & motion to dismiss, filed. C. furn. WCO
	Consent Order by Clerk extending time thru 5-6-74 for pltf. to respond to defts. Dekalb Co., A.C. Guhl, William A. Williams, T.M. Callaway, Jr., Hoke Clayton Smith, Robert J. Morris, Horis A. Ward, & W. M. Coolidge's motion to dismiss & motion to Stike, filed. C. furn. WCO
24	ANSWER of Machinery Buyers Corp. & Southeast Machinery, Inc. to 3rd party Complaint of U.S.A, filed. WCO
	JURY DEMAND by Machinery Buyers Corp. & Southeast Machinery, Inc.. filed. WCO
29	ANSWER TO CROSS-CLAIM of U.S.A., with JURY DEMAND, filed. WCO
30	Consent Order by Clerk extending time thru 5-20-74 for pltf. to respond to deft. USA's 1st interrogs., filed. C. furn. WCO
May 3	3rd party summons issued & delivered to U.S. Marshal.
6	Consent Order by Clerk ext. time thru 5-17-74 for pltf to respond to defts Dekalb Count, A. C. Guhl, William A. Williams, T. M. Callaway, Hoke Smith, Robert Morris, Horis Ward and WM Coolidge's motion to dismiss and to strike, filed. (copies furn)
	Consent Order by Clerk ext. time thru 5-17-74 for pltf to respond to deft American Home Assurance Co.'s motion to strike and dismiss, filed. (copy to counsel)
9	Marshal's return of service as to third party comp. executed as to Machinery Buyers Corp. executed on 5-8-74, filed.
15	ADDITIONAL ANSWER of Machinery Buyers Corp. & Southeast Machinery Inc., to 3rd pty complaint, filed.
16	Consent Order ext. time thru 5/27/74, for pltf to answer, etc., to deft USA's 1st request to produce and permit inspection and copying, filed. (Copy Counsel 5/16)
17	Consent Order by Clerk ext. time thru 5-24-74 for pltf to respond to defts' Dekalb County, Guhl, Williams, Callaway, Smith, Morris, Ward & Coolidge's motion to strike and motion to dismiss, filed. (CF)
	Consent Order by Clerk ext. time thru 5-24-74 for pltf to respond to deft American Home Assurance Co.'s motion to strike and motion to dismiss, filed. (CF)
	Consent Order by Clerk ext. time thru 5-28-74 for pltf to respond to USA's first interrogs., filed. (CF) To WCO
22	Marshal's return of service as to Stanley E. Galkin for Southeast Machinery, Inc. executed 5/20/74, on Third Pty Complaint, filed.
24	Pltf's brief in opposition to Dekalb County and County Commissioners' motion to dismiss and motion to strike, filed. To WCO
	Consent Order by Clerk ext. time thru 5-29-74 for pltf to respond to deft American Home Assurance Co.'s motion to strike and motion to dismiss, filed. (copy to counsel) To WCO
28	SUBMITTED ON DEFTS' DEKALB COUNTY, GUHL, WILLIAMS, CALLAWAY, SMITH, MORRIS, WARD & COOLIDGE'S MOTION TO STRIKE AND MOTION TO DISMISS.
	Consent Order with approval of Clerk extending time thru 6-4-74 for pltf. to respond to deft. USA's 1st request to produce & permit inspection & copying, filed. C. furn. WCO
	Consent Order with approval of Clerk extending time thru 6-4-74 for pltf. to respond to deft. USA's 1st interrogs., filed.
	Pltf's brief in opposition to the motion of American Home Assurance Co. to strike & dismiss, filed. WCO

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET PAGE

DATE 1974	PROCEEDINGS
May 30	SUBMITTED ON AMERICAN HOME ASSURANCE COMPANY'S MOTION TO STRIKE AND DISMISS.
31	Second additional ANSWER of Machinery Buyers Corp & Southeast Machinery,Inc. to third party complaint of U. S. of America, filed. To WCO.
June 5	Pltf's ANSWERS to deft, U. S. of America's first interrogs, filed. To WCO. Response of pltf to deft, U. S. of America's first request to produce and permit inspection and copying addressed to pltf., filed. To WCO.
13	Proposed order to extend time for deft. to have until 6/26/74 to respond to plfts' brief in opposition to deft's Motions to strike and dismiss, rec'd. To WCO
19	Consent Order ext. time thru 6/26/74, for defts Dekalb County, the Chairman & Commissioners of Roads & Revenues of Dekalb Cty and American Home Assurance Co., to file any response to pltf's brief in opposition to defts' motions to strike & dismiss, filed. (Copy Counsel 6/19) WCO
20	Deft Dekalb County, Guhl, Williams, Callaway, Jr., Smith, Morris, Ward & Coolidge's supplemental brief in support of motion to dismiss and to strike, filed. WCO
21	American Home Assurance Co's supplemental brief in support of its motion to strike and dismiss, filed. WCO
24 27	ORDER filed - GRANTING U S's motion to consolidate case with C. A. 19293, for discovery purposes but deferring ruling on consolidation for trial purposes until the pretrial hearing; DENYING DeKalb Co's motion to strike portions of pltf's complaint; GRANTING DeKalb Co's motion to dismiss pltf's complaint as to its claims of negligence, nuisance & for breach of contract; and GRANTING American Home Assurance Co's motion to dismiss. (copy to counsel, 6/28) Cross-Claims of U S against DeKalb Co & American Home Assurance remain.
July 3	Motion of Southeast Machinery, Inc., Machinery Buyers Corp. and Fireman's Fund Insurance Company to vacate, set aside, alter and amend the orders entered on June 27, 1974 and for reconsideration rehearing and new trial with memo in support, filed.
15	Response to pltf's 2nd request for admission addressed to deft. USA, filed.
29	SUBMITTED ON DEFTS' SOUTHEAST MACHINERY, INC., MACHINERY BUYERS CORP., AND FIREMAN'S FUND INSURANCE CO'S MOTION TO VACATE, SET ASIDE, ALTER AND AMEND THE ORDERS ENTERED 6/27/74 & FOR RECONSIDERATION, REHEARING & NEW TRIAL.
31	Deft USA's request to produce and permit inspection and copying filed. (In 19293) ~~Orig-&-Dup-Req~~ WCO Deft USA's 3rd interrogs. to pltfs' Miree, filed. (In 19293) ~~Orig & Dup Req~~ WCO
Aug. 1	Southeast Machinery, Inc., Machinery Buyers Corp. & Fireman's Fund Insurance Co's notice to take depositions, filed. WCO WCO
2	Defts' Supplemental Notice to Take Depositions w/exhibit A/filed.
5	Deft. U.S.A. answers to Miree pltfs' 2nd. interrogs., filed. WCO
19	Deft USA'S memorandum in support of the motion of Southeast Machinery, Inc., Machinery Buyers Corp., & Fireman's Fund Ins. Co. to vacate, set aside, alter and amend the orders of 6/27/74 and for reconsideration, rehearing and new trial, filed. WCO
20	Response of Machinery Buyers Corp., Southeast Machinery, Inc., Fireman's Fund Insurance Co. to the request to produce and permit inspection and copying of the USA, filed. ~~(Orig-&-Dup-Req)~~ WCO

cont'd on Sheet 3

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET PAGE
[illegible]	U.S.A. [illegible]	[illegible]

DATE	PROCEEDINGS
[illegible].27	United States' ANSWERS to the Miree pltfs' 3rd interrog.,filed To WCO
[illegible]	pl. & [illegible] request for production of documents, filed. WCO
10	Deposition of HENRY F. MINGET, JR., filed. (In 19293)
16	Deft, U. S. A.'s motion for Partial Summary Judgment w/memorandum and exhibits, filed.
18	Pltf's response to deft, United States of America's Request for Production of Documents w/attachments, filed. (Copies requested)
21	FINAL JUDGMENT filed & entered dismissing action as to deft American Home Assurance Co., & that pltf take nothing; that taxation of costs in this action shall await entry of final judgment as to all defts. (Copy Counsel 10/23)
25	Proposed Extension and ORDER ext. time thru 12/2/74, for pltf to respond to USA's motion for partial summary judgment, filed. (Copy Counsel 10/30)
29	Letter dated 10/25/74 of Joe C. Freeman, Jr., Rec'd
Nov.1	Deft' U.S.A.'s Interrogs to defts Machinery Buyers Corp and Southeast Machinery, Inc, filed.
11	Letter from pltf's counsel requesting record be sent on appeal, filed.
12	Joint Designation of record on appeal & stipulation of parties that parts of the record on appeal be retained in the District Court, filed.
12	ORDER to forward copies on appeal in lieu of orignals, filed. c. counsel.

ATTEST: A TRUE COPY
CERTIFIED THIS
11-13-74
Ben H. Carter, Clerk

By: [signature]
Deputy Clerk

[6]

[6] [Filed in Clerk's Office Feb. 20, 1974
Ben H. Carter, Clerk; By: P.J.E., Deputy Clerk.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WILLIAM MICHAEL FIELDS,

Plaintiff,

v.

UNITED STATES OF AMERICA;
DEKALB COUNTY, GEORGIA:
A. C. GUHL, in his capacity as Chairman of the Board of Commissioners of Roads and Revenues of DeKalb County;
WILLIAM A. WILLIAMS, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
T. M. CALLAWAY, JR., in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
HOKE CLAYTON SMITH, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
ROBERT J. MORRIS, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
HORIS A. WARD, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
W. M. COOLIDGE, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County; and

CIVIL ACTION NO. C74-291A

[7]

H. F. MANGET, JR., individually and as Airport Manager of the DeKalb-Peachtree Airport; and
AMERICAN HOME ASSURANCE COMPANY,

Defendants.

CIVIL ACTION NO. C74-291A

COMPLAINT
COUNT ONE

[7] 1.

Plaintiff William Michael Fields is a citizen of the State of North Carolina.

2.

(a) Defendant United States of America is subject to the jurisdiction of this Court and may be served with the complaint and summons as provided by law.

(b) Defendant DeKalb County, Georgia, is a political subdivision of the State of Georgia with its fiscal affairs committed to a Board of Commissioners of Roads and Revenues and is located within this judicial district, and is therefore subject to the jurisdiction of this Court. It may be served with the complaint and summons as provided by law.

(c) Defendant A. C. Guhl is sued in his capacity as Chairman of the Board of Commissioners of Roads and Revenues of DeKalb County. Said defendant is a citizen of Georgia and resides within this District, and said defendant is subject to the jurisdiction of this Court and may be served with the complaint and summons as provided by law.

(d) Defendant William A. Williams is sued in his capacity as a Member of the Board of Commissioners of

[7]

Roads and Revenues of DeKalb County, Georgia. Said defendant is a citizen of Georgia and resides within this District, and said defendant is subject to the jurisdiction of this Court and may be served with the complaint and summons as provided by law.

(e) Defendant T. M. Callaway, Jr. is sued in his capacity as a Member of the Board of Commissioners of Roads and Revenues of DeKalb County, Georgia. Said defendant is a citizen of Georgia and resides in this District, and said defendant is subject to the jurisdiction of this Court and may be served with the complaint and summons as provided by law.

[8]

(f) Defendant Hoke Clayton Smith is sued in his capacity as a Member of the Board of Commissioners of Roads and Revenues of DeKalb County, Georgia. Said defendant is a citizen of Georgia and resides in this District, and said defendant is subject to the jurisdiction of this Court and may be served with the complaint and summons as provided by law.

(g) Defendant Robert J. Morris is sued in his capacity as a Member of the Board of Commissioners of Roads and Revenues of DeKalb County, Georgia. Said defendant is a citizen of Georgia and resides in this District, and said defendant is subject to the jurisdiction of this Court and may be served with the complaint and summons as provided by law.

(h) Defendant Horis A. Ward is sued in his capacity as a Member of the Board of Commissioners of Roads and Revenues of DeKalb County, Georgia. Said defendant is a citizen of Georgia and resides in this District, and said

[9]

defendant is subject to the jurisdiction of this Court and may be served with the complaint and summons as provided by law.

(i) Defendant W. M. Coolidge is sued in his capacity as a Member of the Board of Commissioners of Roads and Revenues of DeKalb County, Georgia. Said defendant is a citizen of Georgia and resides in this District, and said defendant is subject to the jurisdiction of this Court and may be served with the complaint and summons as provided by law.

(j) Defendant H. F. Manget, Jr. is sued individually and in his capacity as DeKalb County's Airport Manager of the DeKalb-Peachtree Airport. Said defendant is a citizen of Georgia and resides in this District, and said defendant is subject to the jurisdiction of this Court and may be served with the complaint and summons as provided by law.

(k) American Home Assurance Company is a New York Corporation, with its principal office in that state and with an office and place of business in Fulton County, Georgia; service may be had by serving its agent for service, Roy Overstreet, at 1819 Peachtree Street, Suite 610, Atlanta, Fulton County, Georgia.

[9]

At the time of the injuries herein complained of, Defendant American Home Assurance Company issued a policy of liability insurance to defendant DeKalb County, Georgia, insuring said DeKalb County, Georgia, against liability for bodily injury or death with limits of $100,000.00 for each person and $1,000,000.00 for each accident, and containing the following waiver of Governmental Immunity:

> "It is agreed that the company waives any right to deny liability under the policy or to refuse payment within the limits thereof by reason of the non-liability of the insured political subdivision for the wrongful or negligent acts of its agents and employees and its immunity from suit as an agency of the State performing governmental function."

Said defendant American Home Assurance Company and defendant DeKalb County, Georgia, are liable to plaintiff herein by reason of the provisions of said policy and by reason of the facts herein set forth. A copy of said insurance policy is attached hereto, marked Exhibit "A", and made a part hereof by reference.

3.

(a) With respect to defendant United States of America, this action is brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346(b). More than six months prior hereto, plaintiff submitted an appropriate written administrative claim to defendant United States of America with respect to the damages sought in this action. On December 26, 1973, the Chief Counsel for and on behalf of the Federal Aviation Administration, an agency of the United States of America, made a final disposition of the claims of the plaintiff William Michael Fields by letter denying said claims, a copy of which is attached as Exhibit "B" to the Complaint. Plaintiff therefore has exhausted its administrative remedies in accordance with 28 U.S.C. §2675, and this action is brought within the period of time specified in 28 U.S.C. §2401(b). Jurisdiction of this action in this Court against defendant United States of America [10] is properly founded upon the Federal Tort Claims Act and other applicable laws.

(b) With respect to the remaining defendants, there is complete diversity of citizenship and the value of the matter in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00. Jurisdiction of this action in this Court with respect to the remaining defendants is therefore properly founded upon 28 U.S.C. §1332 and §1391.

(c) With respect to all defendants, all conditions precedent to the filing of this action have been performed or have occurred.

4.

Hereinafter defendant United States of America will sometimes be referred to as "defendant F.A.A." and/or as "defendant U.S.A." and DeKalb County and the Board of Commissioners of Roads and Revenues and H. F. Manget, Jr., individually and as Airport Manager of the DeKalb-Peachtree Airport will sometimes be referred to as the "County defendants."

5.

On February 26, 1973, at approximately 10:12 a.m., E.S.T., a Learjet Model 24 Aircraft, N-454RN, was in the process of taking off from Runway 20L at DeKalb-Peachtree Airport. Immediately after becoming airborne, and while within the boundaries of the airport, the turbine or jet engines of said aircraft ingested a large number of birds, causing a sudden power loss in both engines, and the crash and total destruction of said aircraft, and the death of all seven persons aboard the aircraft, and the injuries to the plaintiff and the damages to his property as herein described.

[10]

6.

On the above date at approximately 10:15 a.m., E.S.T., Plaintiff William Michael Fields was entering his automobile which was parked in an apartment complex, said complex being in close proximity to DeKalb-Peachtree Airport.

[11]

7.

At the above mentioned time and place the disabled aircraft in question passed overhead spewing burning fuel and as a result the plaintiff and his property were engulfed by burning fuel and flames.

8.

Said aircraft then crashed a short distance from the plaintiff killing all persons aboard.

9.

Because of said injuries as will be more fully shown hereafter, the plaintiff has received reasonable and necessary medical services valued in excess of $35,000.00 and will require extensive future medical treatment.

10.

The plaintiff's automobile immediately prior to the crash was valued at $5,500.00 and was completely destroyed.

11.

The plaintiff's personal belongings and business supplies immediately prior to the crash were valued at $4,687.00 and were completely destroyed as a result of actions and inactions of the defendants.

[12]

12.

At the time of said crash, the plaintiff was employed as an independent contractor and salesman with Alfred Shaheen, Ltd., and because of said injuries complained of herein, he has been prevented from pursuing his employment; he incurred large medical expenditures; and he sustained loss of earnings, pain and suffering and permanent disfigurement as more particularly described herein.

13.

Plaintiff William Michael Fields brings this action against each defendant jointly and severally for past, present and future medical expenses; past, present and future lost wages; impairment of earning capacity; property damage; permanent disability; serious and permanent disfigurement and pain and suffering.

[12]

14.

The aircraft in question was a Learjet, Model 24, twin engine turbine-powered jet airplane manufactured by Gates Learjet Corporation, and the engines of said airplane were Model CJ-610-4 turbine-powered jet engines manufactured by General Electric Company.

15.

Shortly prior to the takeoff of the airplane, one of the members of the flight crew of the airplane had filed an IFR (Instrument Flight Rules) flight plan with and had received a weather briefing from the Atlanta Flight Service Station with respect to the proposed flight of the airplane from DeKalb-Peachtree Airport to a destination in Florida.

16.

The Atlanta Flight Service Station is a facility operated, supervised and manned by defendant U.S.A., for the purposes, among other things, of recording and filing flight plans and furnishing pilots with relevant data and information concerning weather, flight conditions and various other matters concerning safety of flight. At and prior to the time of the flight in question, defendant U.S.A., (including personnel of the Atlanta Flight Service Station) had actual knowledge that a bird hazard, bird problem and bird-attracting open garbage dump existed at DeKalb-Peachtree Airport.

17.

Prior to the beginning of the flight in question, and in accordance with Federal Aviation Regulations, the flight crew of the airplane had contacted both the ground control and tower control facilities of defendant F.A.A. at the Airport and had advised defendant F.A.A. of the proposed I.F.R. flight from DeKalb-Peachtree Airport. In response to such communications from the flight crew, the defendant F.A.A. through its ground control and tower control facilities instructed and directed the flight crew to taxi the Learjet to Runway 20L. The flight crew received from defendant F.A.A. the I.F.R. clearance as filed, and the flight was cleared for takeoff from Runway 20L by the defendant F.A.A. at 10:10.40 a.m., E.S.T. At and prior to the time of takeoff, the personnel [13] of defendant F.A.A. who were operating said ground and tower control facilities knew or should have known that a bird hazard, bird problem and bird-attracting open garbage dump existed at the Airport.

18.

After the crash the remains of many dead starlings or cowbirds or similar birds were found at or near the departure end of Runway 20L, and bird remains and particles of protein matter were found on the airplane windshield and center post and in the airplane engines. Also, immediately prior to and after the crash large flocks of starlings, cowbirds or similar birds were located in and about the Airport boundaries and the adjacent garbage dump operated by the County defendants.

19.

Prior to the crash, both the defendant U.S.A. and the County defendants knew or should have known that birds could be ingested into turbine or jet engines, including Learjet engines, and that turbine or jet engine bird ingestion could cause a loss of engine power and an engine failure and a crash. Prior to the crash, the defendant F.A.A. and the County defendants knew or should have known that a dangerous bird hazard, bird problem and bird-attracting open garbage dump existed at the Airport.

20.

At and prior to takeoff of the airplane, however, the defendants herein knew or should have known that a bird hazard, bird problem and bird-attracting open garbage dump existed at the Airport, and that extremely large flocks of starlings and similar types of birds were located within or near the Airport boundaries and in dangerously close proximity to Runway 20L. The open garbage dump was visible to the air traffic control specialists employed by defendant F.A.A. and located in the air

[13]

traffic control tower maintained and operated by defendant F.A.A.

[14]

21.

The United States of America, through the Department of Transportation and the Administrator of the F.A.A., has been directed by Congress in the Federal Aviation Act of 1958, as amended, to assume responsibility as follows:

> "to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest." 49 U.S.C. §1348(a).

22.

The United States of America, through the Department of Transportation and the Administrator of the F.A.A., is further authorized by Congress in said Act to assume responsibility as follows:

> "(1) to acquire, establish, and improve air-navigation facilities wherever necessary;
>
> (2) to operate and maintain such air-navigation facilities; . . .
>
> (4) to provide necessary facilities and personnel for the regulation and protection of air traffic." 49 U.S.C. §1348(b).

23.

The United States of America, through the Department of Transportation and the Administrator of the F.A.A.,

[15]

is further directed by Congress in said Act to assume responsibility as follows:

> "to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects." 49 U.S.C. §1348(c).

24.

The aforementioned directions to and placement of responsibility on the United States of America are pursuant to the Congressional determination found at 49 U.S.C. §1303 that the United States of America through the Administrator of the F.A.A. shall consider the following as being in the public interest:

[15]

> "(a) The regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense;
>
> (b) The promotion, encouragement, and development of civil aeronautics;
>
> (c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both;
>
> (d) The consolidation of research and development with respect to air navigation facilities, as well as the installation and operation thereof;
>
> (e) The development and operation of a common

system of air traffic control and navigation for both military and civil aircraft."

25.

The United States of America, through the Department of Transportation and the Administrator of the F.A.A., is further given the duty by Congress in said Act as follows:

"to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time: . . .

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for . . . safety in air commerce." 49 U.S.C. §1421 (a) (6).

26.

Pursuant to the aforesaid authority and directions from Congress the United States of America administers air traffic control of civil air operations within United States airspace; operates F.A.A. air route traffic control centers, airport traffic control towers, flight service stations, and related communications equipment required for control of air traffic; and collects and disseminates information relative to civil aeronautics and safety of flight.

27.

Also pursuant to said Congressional authority and directions the United States of America has established as being necessary and operates air navigation facilities, including an Airport Traffic Control Tower (ATCT) at DeKalb-Peachtree Airport and a flight service station in Fulton County, Georgia, which flight service station

serves the geographical area in which DeKalb-Peachtree Airport is located.

[16] 28.

An ATCT is a central operations facility in the terminal air traffic control system, consisting of a tower cab structure, including an associated IFR room if radar equipped, using air/ground communications and/or radar, visual signaling and other devices, to provide safe and expeditious movement of air and ground traffic.

29.

The ATCT at DeKalb-Peachtree Airport is operated by the F.A.A. and is "responsible for the safe, orderly and expeditious flow of air traffic in the vicinity of an [the] Airport." 30 F.R. 3395, as amended; 16 F.R. 2975; 2979, revised 19 F.R. 2098, §24.

30.

Said ATCT is manned by personnel (employed by the United States of America) "who are responsible for the safe and orderly flow of air traffic in the vicinity of the Airport." Their principal duties are as follows:

(a) "To issue instructions to pilots for taxiing, take-off, approach for landing, and landing of aircraft.

(b) "To inform pilots regarding field and weather conditions, air navigational facilities, emergency landing areas, restructions to flight, regulations, and other matters which may be of assistance to the pilot.

(c) "To relay messages between pilots, airline operations offices, Air Route Traffic Control Centers,

Weather Bureau Offices, Communications Stations and other appropriate agencies concerning the operations, dispatch, and control of aircraft.

(d) "To invoke emergency procedures when any emergency occurs or appears likely to occur to aircraft under tower control.

(e) "When equipped with airport surveillance and precision approach radar, to monitor aircraft arriving and departing from an airport on instruments, and, in an emergency or upon request, issuing ground controlled approach instructions (GCA) for a let-down." 16 F.R. 2974, 2979, revised 19 F.R. 2098, §24.

31.

Pursuant to the authority and directions of Congress, the United States of America, through the Department of Transportation and the F.A.A., prior to the crash in question had issued Advisory Circular No. 150/5200-3A, dated March 2, [17] 1972, entitled "Bird Hazards to Aircraft," in which the United States of America through said agencies stated in part as follows:

"Migratory birds, particularly waterfowl, are a hazard to aircraft due to their size and weight. In recognition of this potential hazard, F.A.A. Air Traffic Control and Flight Service Station facilities issue advisory information on bird activities when they are reported or when they have knowledge of such activities. Information given to pilots includes the position, species or size of bird if known, and their course and altitude."

32.

The defendant F.A.A. in said Advisory Circular also admitted that the birds of greatest potential hazard to

aircraft because of size, abundance, or habit of flying in dense flocks, include starlings; that birds of these species are considered particularly hazardous during spring and fall migrations and when they are concentrated in wintering areas; and that at some airports there are large flocks of certain birds which could be a problem during certain seasons. DeKalb-Peachtree Airport is not named or referred to in said Advisory Circular.

33.

To cope with these admitted flight hazards, the Advisory Circular states that the United States of America, through the F.A.A., is operating as follows:

"F.A.A. Air Traffic Control and Flight Service Station facilities coordinate with airport management for either appropriate alerting action by a Notice to Airmen when flocks of birds are noted to remain in the airport vicinity or for possible closing by a Notice to Airmen when flocks roost on runways."

34.

The Federal Government personnel providing terminal air traffic control services at airports, including DeKalb-Peachtree Airport, were prior to injuries herein complained of required by the United States of America to be familiar with the provisions of the Terminal Air Traffic Control Manual, 7110.8, one of the air traffic control manuals referred to in Part 65 of the Federal Aviation Regulations, in which Manual are set forth the following duties and responsibilities of air traffic control personnel:

[18]

"If you observe or are informed of any condition which affects the safe use of a landing area:

(a) Relay the information to the airport manager concerned.

(b) Issue a Notice to Airmen publicizing an unsafe condition if you are unable to contact the airport manager (or if there is no airport manager designated) and then inform the manager as soon as practicable. . . ."

"122. BIRD ACTIVITY
ADDUL SVC

"a. Issue advisory information on the position and, if known, species or size of birds, and their course of flight and altitude if you believe that the safety of flight in that area may be affected. Do this for at least 15 minutes after receipt of such information from pilots or from adjacent facilities unless visual observation or subsequent reports reveal the activity is no longer a factor."

"1552. BIRD ACTIVITY INFORMATION

"a. Issue advisory information on pilot-reported or radar-observed and pilot-verified bird activity. Include position, species or size of birds, if known, course of flight and altitude. (E)

Phraseology:

FLOCK OF (Species, if known/size, if known) BIRDS, (number) O'CLOCK (number of miles) MILES (direction) BOUND:

LAST REPORTED AT (altitude, as determined from pilot report).

or

ALTITUDE UNKNOWN.

FLOCK OF (species, if known) / (size, if known) BIRDS (direction) BOUND ALONG (flyway or geographical route):

LAST REPORTED AT (altitude, as determined from pilot report).

or

ALTITUDE UNKNOWN.

FLOCK OF / NUMEROUS FLOCKS (species, if known) / (size, if known) BIRDS, VICINITY (location):

LAST REPORTED AT (altitude, as determined from pilot report).

or

ALTITUDE UNKNOWN.

b. Relay bird activity information to adjacent facilities and to FSS's whenever it appears it will become a factor in their areas."

35.

Despite the Advisory Circular and the provisions of the Terminal Air Traffic Control Manual, aforementioned, the Federal Government personnel providing terminal air traffic control services and flight service station facilities for DeKalb-Peachtree Airport negligently failed to issue a Notice [19] to Airmen prior to the crash of the aforesaid aircraft when said personnel knew or should have known of the bird hazard at DeKalb-Peachtree Airport.

36.

The County defendants negligently failed to coordinate with the above-mentioned personnel for either appropriate alerting action by Notice to Airmen when said County defendants knew or should have known that flocks of birds remained in the airport vicinity or for possible closing by a Notice to Airmen when said County defendants

knew or should have known that flocks of birds roosted on the runways.

37.

The United States of America, through its said agencies and their predecessors, have known about bird hazards to aircraft at least since the 1940's, when the F.A.A. published a report of the collection and compilation of detailed statistics on the collision of aircraft with birds, which report was admitted into evidence in *Rapp v. Eastern Air Lines, Inc., U.S.A., et al.*, 264 F.Supp. 673 (E.D. Pa. 1967), and which report showed 1946 statistics on bird strikes by aircraft, including there being more than one such collision per day during this early aviation period.

38.

DeKalb-Peachtree Airport is located within the boundaries of DeKalb County on land owned by the County, and said Airport is owned, operated and managed and maintained by the County defendants. Said Airport has paved runways and airport hangars, servicing and parking facilities, a control tower with radio facilities, an instrument landing system control center, and access to other radio and navigational aids. The Airport is operated by the County defendants for the public welfare and benefit of the citizens of the United States of America, including plaintiff, and is operated under the jurisdiction of the Federal Aviation Administration.

39.

DeKalb County, Georgia acquired the DeKalb-Peachtree Airport by way of quit-claim deed from the General Services [20] Administration of the United States of

America on or about February 15, 1960. The County's personnel operated the control tower at the DeKalb-Peachtree Airport from March, 1959, until January, 1963, when they were replaced by Federal Aviation Administration Air Traffic personnel. On February 26, 1973, the date of the injuries complained of herein, the air traffic contro tower was operated by Federal Aviation Administration Air Traffic Control personnel.

40.

Beginning in 1962, a portion of the land constituting the Airport site was used by DeKalb County as a garbage dump. In 1964 the dump was closed and remained closed until March, 1966, when it was reopened. Since that time DeKalb County has utilized a portion of or land adjoining the Airport site for dumping garbage.

41.

Prior to injuries herein complained of, employees of DeKalb County at the Airport observed and reported a significant increase in the number of birds on or in the vicinity of the Airport following the utilization of the Airport site for garbage disposal.

42.

On and prior to February 26, 1973, DeKalb County had been using the Airport site as an open garbage dump where large quantities of raw garbage, refuse, offal, filth, waste and trash by the truck loads were dumped and deposited upon the Airport site numerous times during each day by personnel and vehicles controlled by said DeKalb County through its Sanitation Department and

under the ultimate direction and control of the County defendants.

43.

The said untreated raw garbage, refuse, trash, offal, filth and other waste material deposited by the County defendants as aforesaid created a large area constituting an attraction to birds and causing large flocks of birds to congregate about the Airport, the runways, ends of runways and other areas within the Airport boundaries. The [21] attractiveness of said open garbage dump to birds was increased by the failure of the County defendants to remove trees, undergrowth and high grass from the area of the open garbage dump and along the runways, which foliage provided roosting, nesting and basking areas for the large flocks of birds attracted to the garbage dump. Said birds at certain times remained, walked and ran upon said runways and adjacent grass areas at the sides and ends of the runways, and congregated in the numerous trees on and about the Airport area. Said birds when located upon the Airport grounds often flew aloft in large flocks many times each day as aircraft would take off, approach, land or fly near said Airport, and said birds constituted a continuous hazard at said Airport to the safety of aircraft and to the safety and lives of the crews and passengers therein and to persons residing and located upon the ground in the vicinity of said Airport.

44.

All of the foregoing was known or should have been known by all defendants at and prior to the time of the crash involved in this lawsuit.

45.

At the time of injuries herein complained of, the United States of America, by and through the Department of Transportation, Federal Aviation Administration, has the responsibility for the administration of the Federal Airport and Airway Development Act of 1970 and its predecessor, the Federal Airport Act of 1946. Involved in the administration of the programs was the responsibility of enforcing the provisions of the various Grant Agreements issued in accordance with the provisions of these Acts. These Grant Agreements included provisions under which the airport owners maintain and operate airports in accordance with the standards set forth in these Agreements.

46.

At the time of injuries herein complained of, the United States of America has the responsibility for and [22] jurisdiction over the safety of DeKalb-Peachtree Airport to the extent that it was the duty of the United States of America, as a condition precedent to the granting of funds for Airport developments, to receive assurances from the owners of the Airport that airport hazards would be mitigated.

47.

Beginning in June, 1962, the Federal Government entered into six (6) Grant Agreements with DeKalb County, pursuant to which at least $1,025,224.06 was paid to the County for the purpose of assisting the County in the improvement and development of DeKalb-Peachtree Airport, including the construction of Runway 20L-2R which was begun in 1966 and completed in 1968.

48.

Associated with the various Grant Agreements is an airport layout plan developed by DeKalb County and approved by the Federal Aviation Administration which graphically illustrates the development and proposed development of the airport facilities and the use of the land included within the airport boundaries at all times pertinent hereto. Such use did not include an open garbage dump or any other dumping ground for garbage.

49.

Prior to the crash in question, the United States of America, through the Federal Aviation Administration, recognized that the existence of the open garbage dump constituted an attraction to birds of various species, and that birds constituted a definite hazard for aircraft taking off and landing at the Airport.

50.

From March 9, 1970, through February 14, 1972, the Federal Aviation Administration communicated with officials of DeKalb County, both by letter and by conference, relative to alleviation of the bird hazard caused by the existence of the open garbage dump on the airport site. In February, 1971, the F.A.A. was advised by DeKalb County that the dump would be closed by August, 1972, but DeKalb County failed to keep its word in this regard.

[23] 51.

On the 27th day of June, 1967, the Federal Aviation Administration and the United States of America entered into one of a series of similar Agreements with DeKalb

County by and through the Chairman of the Board of Commissioners of Roads and Revenues.

52.

Said Agreements as related to aforesaid Airport in pertinent part provided as follows:

> "The Sponsor [DeKalb County] will keep up to date at all times an airport layout plan . . . Such airport layout plan, and each amendment, revision, or modification thereof, shall be subject to the approval of the F.A.A., which approval shall be evidenced by the signature of a duly authorized representative of the F.A.A. on the face of the airport layout plan. The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the F.A.A., if such changes or alterations might adversely affect the safety, utility, or efficiency of the Airport."

53.

Prior to the injuries herein complained of, the defendant F.A.A. negligently allowed changes in the airport layout, contrary to the official layout plan, when they knew of the existence of said sanitary landfill or garbage dump, and when the defendant F.A.A. had the power and jurisdiction to have mitigated said Airport hazard.

54.

With further reference to said Agreement, as part of the consideration for the sums paid by the United States of America to DeKalb County, said DeKalb County, as Sponsor, agreed as follows:

> "These covenants shall remain in full force and effect throughout the useful life of the facilities developed

[23]

under this Project, . . ." (Project Application, Sponsor's Assurances, Paragraph 1).

and

"The Sponsor will operate the Airport as such for the use and benefit of the public. . . . The Sponsor may prohibit or limit any given type, kind or class of aeronautical use of the Airport if such action is necessary for the safe operation of the Airport or necessary to serve the civil aviation needs of the public." (Project Application, Sponsor's Assurances, Paragraph 2).

[24] and

"The Sponsor will operate and maintain in a safe and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes." (Project Application, Sponsor's Assurances, Paragraph 6).

and

"In addition, the Sponsor will not erect or permit the erection of any permanent structure or facility which would interfere materially with the use, operation, or future development of the Airport, in any portion of a runway approach area in which the Sponsor has acquired, or may hereafter acquire, property interests permitting it to so control the use made of the surface of the land." (Project Application, Sponsor's Assurances, Paragraph 7).

and

". . . The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the

[25]

airport layout plan as so approved by the F.A.A., if such changes or alterations might adversely affect the safety, utility, or efficiency of the Airport." (Project Application, Sponsor's Assurances, Paragraph 12).

and

"Insofar as is within its power and to the extent reasonable, the Sponsor will take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and take-off of aircraft." (Project Application, Sponsor's Assurances, Paragraph 13).

55.

The County defendants violated the provisions of said contract by willfully permitting the existence of an open garbage dump and bird hazard on the Airport site and adjacent to Runway 20L. Said contract having been made for the benefit of the public, plaintiff was a third party beneficiary of said contract and any other contracts and agreements similarly made between DeKalb County and the United States of America. The County defendants are liable for breach of said contract and any other similar contracts and are liable for the damages sustained by plaintiff resulting from the negligence and recklessness of the County defendants growing out of the breach of said contract, as related to aforesaid Airport.

[25] 56.

By reason of the existence of said open garbage dump prior to and on February 26, 1973, the operation of the Airport by the County defendants and defendant F.A.A. constituted a public and private nuisance and a hazard to public safety.

57.

The maintenance of said open garbage dump at said DeKalb-Peachtree Airport constituted an airport hazard as defined in 49 U.S.C. §1101, 49 U.S.C. §1711, and was a violation of 49 U.S.C. §1110 (3) and 49 U.S.C. §1718 (3).

58.

The United States of America, by and through its agents and employees, was also guilty of negligence proximately causing and contributing to the damages of plaintiff in the following particulars:

(a) In failing to require DeKalb County to remove and mitigate the Airport bird hazard by reason of the dumping of garbage on DeKalb-Peachtree Airport, the same being negligence per se and negligence as a matter of fact.

(b) In allowing jet propelled aircraft to operate in and out of DeKalb-Peachtree Airport when birds were a known hazard by reason of existence of the open garbage dump;

(c) In clearing the Learjet airplane for takeoff on February 26, 1973, in spite of the known or should have been known existence of numerous birds which were located in the vicinity of runway 20L at DeKalb-Peachtree Airport;

(d) In failing to give reasonable and adequate notice to pilots and the flight crew of the Learjet of the danger of birds to aircraft at the DeKalb-Peachtree Airport;

(e) In allowing DeKalb County to accomplish a change in the Airport layout plan of DeKalb-Peachtree Airport by establishing and maintaining an open garbage dump thereon, the same being in violation of the

airport layout plan which had been previously approved by the United States of America.

[26]

(f) In failing (through the Federal Aviation Administration and/or the Secretary of Transportation) to develop adequate safety standards for the manufacturers of Learjet aircraft and their engines governing the design and performance of aircraft engines as required in the interest of safety, which failure was a proximate cause of the crash and the injuries which are the subject of this claim.

(g) In failing (through the Federal Aviation Administration and/or the Secretary of Transportation) to take steps to decrease the number of birds which were attracted to the aforesaid garbage dump prior to the crash in question, which failure was a proximate cause of the crash and injuries which are the subject of this claim.

59.

The County defendants and their agents, servants and employees, were guilty of breach of contract and negligence arising out of breach of contract with the United States of America, all of which proximately caused and contributed to the damages of plaintiff, as follows:

(a) In permitting changes in the DeKalb-Peachtree Airport and its facilities, other than in conformity with the airport layout plan as officially approved by the United States of America, where such changes adversely affected the safety of the Airport;

(b) In operating the DeKalb-Peachtree Airport for the benefit of the public, and in connection therewith failing to prohibit the use of jet propelled aircraft where a portion of the Airport or land contiguous thereto was

utilized as an open garbage dump attracting large flocks of birds;

(c) In permitting activity at the Airport and facilities thereon which interfered with its use for airport purposes;

(d) In failing to restrict the use of land adjacent to Runway 20L of the Airport to purposes compatible with flight safety and normal operation of the Airport;

(e) In failing to act upon and abide by the specific warning of the United States of America with respect to the hazard created by the open garbage dump and the requests made [27] to remove said dump;

(f) In dumping and depositing (or in permitting such dumping and depositing) untreated garbage, trash, refuse, offal, filth and other waste materials on DeKalb-Peachtree Airport property;

(g) In failing to warn or advise jet aircraft owners and pilots of the danger created by the flocks of birds located in and about the vicinity of the Airport;

(h) In recklessly and wantonly continuing to use Airport property for an open garbage dump after receiving notice of the bird hazard.

60.

The defendant F.A.A. was also guilty of negligence causing and contributing to plaintiff's damages, in that the Atlanta Flight Service Station personnel and the DeKalb-Peachtree Airport air traffic control tower personnel negligently cleared the Lear Jet for takeoff from Runway 20L, contrary to the provisions of the Terminal Air Traffic Control Manual referred to in Paragraph No. 34, above, and the Advisory Circular referred to in Paragraphs No. 31, 32 and 33, above, and the provisions of

the Federal Register referred to in Paragraphs Nos. 29 and 30, above.

61.

The defendant F.A.A., by direction of Congress, is responsible for certification of aircraft as airworthy and for issuing type and production certificates for aircraft, including the Learjet Model 24. The defendant F.A.A. was also guilty of negligence proximately causing and contributing to the damages of plaintiff, as follows:

(a) In issuing a type certificate, production certificate and airworthiness certificate for the Learjet Model 24, including the accident aircraft, without any restrictions as to use of the aircraft in areas of known bird hazards, when defendant F.A.A. knew or should have known that the aircraft was capable of ingesting birds and that bird ingestion on take-off would cause a power loss and a resulting dangerous hazard to the safety of the airplane, persons aboard the airplane, and persons in vicinity of the airport;

[28]

(b) In failing to place restrictions on the type certificate, production certificate and airworthiness certificate of the Learjet Model 24, forbidding operation of the aircraft in areas of known bird hazards;

(c) In failing to prohibit operation of Learjet Model 24 aircraft at DeKalb-Peachtree Airport, when defendant F.A.A. knew or should have known that a bird hazard existed at said airport; and

(d) In failing to devise a system or procedure whereby Learjet Model 24 aircraft would not be cleared for takeoff at DeKalb-Peachtree Airport when a bird hazard was known or should have been known by defendant F.A.A. to exist at said airport.

62.

(a) Georgia Code Section 11-402(2) defines an "airport hazard" as any structure which is hazardous to the use of an airport for the taking off and landing of airplanes.

(b) Georgia Code Section 11-403 declares that an airport hazard endangers the lives and property of users of the airport and is therefore not in the interest of the public health, public safety or general welfare.

(c) Georgia Code Section 11-9902 declares that the violation of any airport zoning regulations shall constitute a misdemeanor.

(d) Section 1(b) of the 1960 DeKalb County Airport Zoning Resolution concerning DeKalb-Peachtree Airport defines an "airport hazard" as any structure or *use of land* which is "hazardous to such landing or taking off of aircraft."

(e) Section 5 of the 1960 DeKalb County Airport Zoning Resolution declares that no use may be made of land within any airport approach surface zone, horizontal surface zone, conical surface zone or transitional surface zone at DeKalb-Peachtree Airport, in such manner as to endanger the landing, taking off or manuevering of aircraft.

[29]

(f) Section 8 of the 1960 DeKalb County Airport Zoning Resolution declares that no material change shall be made in the use of land at DeKalb-Peachtree Airport and no structure shall be erected, altered, planted or otherwise established in any airport approach surface zone, horizontal surface zone, or conical surface zone unless a permit therefor shall have been applied for and granted.

Said Section 8 also declares that no permit shall be granted that would allow the establishment or creation of an airport hazard or permit a non-conforming use or structure to become a greater hazard to air navigation.

(g) Section 14 of said 1960 DeKalb County Airport Zoning Resolution also declares that every violation of said Resolution shall be punishable by fine or imprisonment, or both.

(h) The open garbage dump in question in this case is an airport hazard, as defined by Georgia Code Section 11-402(2) and Section 1(b) of the aforesaid Zoning Resolution. No permit was ever applied for or granted with respect to the establishment and operation of said open garbage dump. The maintenance of said open garbage dump is forbidden by Georgia Code Section 11-403, and by Sections 5 and 8 of said Zoning Resolution. The actions of the County defendants in establishing and operating said open garbage dump violated the aforesaid laws of Georgia and the aforesaid Zoning Resolution, and constitute negligence per se proximately causing and contributing to plaintiff's damages.

63.

The County defendants were also guilty of negligence per se proximately causing and contributing to plaintiff's damages, in that the County defendants enhanced and increased the bird-attracting nature of said open garbage dump by failing to place a compacted layer of at least six inches of clean earth over all exposed solid waste at the end of each day's operation, and by failing to spread solid waste in uniform layers not over two feet thick, and by failing to compact [30] solid waste prior to covering with

earth, and by otherwise operating and maintaining said open garbage dump in violation of the Georgia Solid Waste Management Act (Georgia Code Sections 43-1601, *et. seq.*) and the Rules and regulations of the Georgia Department of Natural Resources, Environmental Protection Division, concerning Solid Waste Management (Rules and Regulations of the State of Georgia, Sections 391-1-1-.1 *et seq.*).

64.

At all times relevant it was the duty of the County defendants to operate and manage DeKalb-Peachtree Airport in a safe condition. The County defendants were guilty of negligent acts and failures to act and derelictions of duties in their individual, personal capacities and in their official capacities, proximately causing and contributing to plaintiff's damages, in that the County defendants at all times relevant had actual, personal knowledge of the bird hazard and unsafe condition that existed at the Airport, and in that the County defendants had ample opportunity either to remove the bird hazard and unsafe condition or to prohibit the operation of jet aircraft at the Airport, and in that the County defendants failed to heed the warnings of defendant F.A.A. and others concerning such bird hazard and unsafe condition, and in that the County defendants willfully, wantonly, recklessly and negligently failed either to alleviate the bird hazard and unsafe condition, or to prohibit operation of jet aircraft at the Airport, or to warn the flight crews of jet aircraft of the bird hazard and unsafe condition, or to devise a system, plan or procedure for the warning of jet flight crews of the bird hazard or unsafe condition.

65.

The willful, wanton nature of the negligence and dereliction of duties of the County defendants and the seriousness of the negligence and carelessness of defendant F.A.A. are exemplified by the fact that prior to the injuries in question, the County defendants and defendant F.A.A. [31] had received notice of several airplane bird-strike or near bird-strike incidents within the airport boundaries, but despite this knowledge of prior incidents the County defendants and defendant F.A.A. failed to take any action at all to prevent a recurrence of such incidents.

66.

(a) DeKalb-Peachtree Airport is not owned, operated, managed and maintained by the County defendants as a governmental function or enterprise, but, instead, is owned, operated, and maintained and managed by the County defendants as a proprietary or ministerial function or enterprise. In this connection, plaintiff shows that the County defendants lease substantial portions of the Airport to private companies engaged in commercial operations for profit; that some of such leases are for fixed rental amounts and the remaining leases are for fixed rental amounts plus a percentage of the revenues or income derived by the tenants from their commercial operations; that the revenues thus obtained by the County defendants are not insignificant, but are substantial, and that the Airport is owned, operated, managed and maintained by the County defendants primarily as a source of revenue for the County defendants. In effect, with respect to the ownership, operation, management and maintenance of the Airport, the County defendants act as a private landlord and not as a governmental entity.

[31]

(b) Prior to the date of the crash in question, DeKalb County purchased a policy of liability insurance from the defendant American Home Assurance Company providing bodily injury liability insurance and property damage liability insurance to the County defendants with respect to the ownership, operation, management and maintenance of DeKalb-Peachtree Airport by the County defendants. Said policy of liability insurance provides coverage to the County defendants with respect to the claims of plaintiff herein. Said policy of insurance also contains a "Waiver of Governmental Immunity" rider which provides as follows:

> "It is agreed that the Company waives any right to deny liability under the policy or to refuse payment within the limits thereof by reason of [32] the nonliability of the insured political subdivision for the wrongful or negligent acts of its agents and employees and its immunity from suit as an agency of the State performing governmental functions."

Said policy was in full force and effect at the time of injuries complained of.

(c) The County defendants are not entitled to the benefit or protection of the doctrine of sovereign immunity with respect to the claims of plaintiff herein.

67.

By virtue of the operation of DeKalb-Peachtree Airport by the County defendants under the Uniform Airports Act (Georgia Code Sections 11-201, *et seq.*) and under the Federal Airport and Airway Development Act (49 U.S.C. §§1711, *et seq.*) and its predecessor, the Federal Airport Act (49 U.S.C. §§1101, *et seq.*) and by virtue of the Grant

Agreements and payments of Federal funds referred to earlier in this lawsuit, and by virtue of the application of the provisions of the Georgia Solid Waste Management Act and the Rules and Regulations of the Georgia Department of Natural Resources, Environmental Protection Division (Solid Waste Management) to the facts of this case, and by virtue of the application of the 1960 DeKalb County Airport Zoning Resolution to the facts of this case, an express or implied statutory waiver of the doctrine of sovereign immunity exists with respect to the claims of plaintiff against the County defendants. In the alternative, as a result of the acts and failures to act of the County defendants as alleged herein, and as a result of the acceptance and retention of benefits by the County defendants under the various statutes, rules and regulations and Grant Agreements referred to herein, the County defendants either expressly or impliedly have waived any defense based upon the doctrine of sovereign immunity, with respect to the claims of plaintiff herein.

68.

As a result of the aforesaid negligence, acts and omissions by the defendants, the plaintiff was injured by:

(a) Burns over 55% of his body surface area;

[33]

(b) Associated pulmonary burns covering his face, trunk, both arms and hands and both legs and feet;

(c) Permanent disfigurement and scarring of his face, hands, arms, legs and feet;

(d) Loss of ability to move individual joints of his hands and wrists;

(e) Permanent restriction in the motion of his joints and muscles of his limbs;

(f) Damage to his skeletal system which caused bone blocks and loss of ability to move his arms.

(g) The physical, mental, and emotional trauma of being critically burned, hospitalized over a long period of time with excrutiating pain, forced to undergo numerous agonizing surgical procedures and operations necessary for skin grafts and debridement of his wounds, undergoing intense physical therapy and enduring surgery to repair damage to his skeletal system.

69.

In the future, plaintiff will be forced to undergo further surgical procedures, including skeletal surgery, further physical therapy to rehabilitate many areas of motor weakness, possible further skin grafts, and plastic surgery for the extreme residual scars which cover his body.

70.

For the rest of his natural life, medical treatment and attention for his injuries will be necessary and the plaintiff will endure physical, mental and emotional pain and suffering caused by his injuries.

WHEREFORE, plaintiff respectfully prays and demands that process issue as provided by law, requiring defendants to appear and answer this Complaint; that a jury trial be demanded; that plaintiff have judgment against all defendants jointly and severally in the sum of $3,045,187.00 plus all costs of Court; and that plaintiff have such other and further relief as the Court deems just and proper.

[34] **COUNT TWO**

As his second and alternative claim for relief, plaintiff respectfully shows to the Court the following:

1.

Plaintiff incorporates, adopts, repeats and re-alleges herein by reference the allegations of paragraphs number 1 through 70 of Count One of this Complaint.

2.

By operating the open garbage dump in the condition and manner described in this complaint, and by managing, maintaining and operating DeKalb-Peachtree Airport in the manner and condition described in this Complaint, the County defendants are guilty of maintaining a public and private nuisance injurious to public and private health, person and property.

3.

The maintenance of said nuisance by the County defendants was a proximate and contributing cause of the airplane crash in question, and resulted in damage to plaintiff in the sum of $3,045,187.00.

WHEREFORE, plaintiff respectfully prays that process issue as provided by law, requiring the County defendants to appear and answer this complaint; that a jury trial be demanded; that plaintiff have judgment against all of the County defendants including American Home Assurance Company jointly and severally in the sum of $3,045,187.00 plus all costs of Court; and that plaintiff have such other and further relief as the Court deems proper and just.

COUNT THREE

As his third and alternative claim for relief, plaintiff respectfully shows to the Court the following:

1.

Plaintiff incorporates, adopts, repeats and re-alleges herein by reference the allegations of paragraphs numbered 1 through 70 of Count One of this Complaint.

[35] 2.

The County defendants have willfully and wantonly breached, violated and disregarded the provisions, assurances and contractual commitments contained in the aforesaid Grant Agreements and related contracts and documents, all of which Grant Agreements, related contracts and documents were designed and intended to inure to the benefit of plaintiff and other members of the public, as third-party beneficiaries.

3.

The airplane crash in question and plaintiff's damages were proximately caused by the said breaches of contract by the County defendants, and the County defendants are therefore liable to plaintiff for breach of contract in the sum of $3,045,187.00.

WHEREFORE, plaintiff respectfully prays that process issue as provided by law, requiring the County defendants including American Home Assurance Company to appear and answer this complaint; that a jury trial be demanded; that plaintiff have judgment against all of the County defendants jointly and severally in the sum of

$3,045,187.00 plus all costs of Court; and that plaintiff have such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ ROBERT W. PATRICK
ROBERT W. PATRICK

/s/ ROBERT M. TRAVIS
ROBERT M. TRAVIS

POWELL, GOLDSTEIN, FRAZER
& MURPHY
1100 C & S National Bank Building
Atlanta, Georgia 30303

/s/ HERBERT S. FALK, JR.
HERBERT S. FALK, JR.
Attorneys for the Plaintiff

FALK, CARRUTHERS & ROTH
P. O. Box 540
Greensboro, North Carolina 27402

[48]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[48] [Filed in Clerk's Office Apr. 15, 1974,
Ben H. Carter, Clerk; By: P.J.E., Deputy Clerk.]

WILLIAM MICHAEL FIELDS,
Plaintiff,

vs.

UNITED STATES OF AMERICA;
DEKALB COUNTY, GEORGIA;
A. C. GUHL, in his capacity as Chairman of the Board of Commissioners of Roads and Revenues of DeKalb County;
WILLIAM A. WILLIAMS, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
T. M. CALLAWAY, JR., in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
HOKE CLAYTON SMITH, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
ROBERT J. MORRIS, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
HORIS A. WARD, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
W. M. COOLIDGE, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
H. F. MANGET, individually and as Airport Manager of the DeKalb-Peachtree Airport, and
AMERICAN HOME ASSURANCE COMPANY,
Defendants.

CIVIL ACTION FILE NO. C-74-291-A

[49]

MOTION TO STRIKE

Now come DEKALB COUNTY, GEORGIA, A. C. GUHL, WILLIAM A. WILLIAMS, T. M. CALLAWAY, JR., HOKE CLAYTON SMITH, [49] ROBERT J. MORRIS, HORIS A. WARD, and W. M. COOLIDGE, some of the Defendants in the above-styled action, and move the Court, pursuant to Rule 12, Federal Rules of Civil Procedure, to strike certain allegations from the Complaint, showing the Court as follows:

1.

Defendants move to strike Paragraphs 56 of Count One and 2 of Count Two from the Complaint on the grounds that said Paragraphs fail to state a claim upon which relief can be granted in that in Georgia, an action will not lie against a County for the alleged creation and/or maintenance of nuisance.

2.

Defendants move to strike Paragraphs 2 (k) and 66 (b) from the Complaint on the ground that said Paragraphs fail to state a claim upon which relief can be granted in that in Georgia, no direct action lies against the insurer of one of the Defendants and evidence of such is inadmissible and prejudicial.

3.

Defendants move to strike Paragraphs 19, 20, 43, 59, 64, 65, the remaining allegations of 66 and 67 from the Plaintiff's Complaint on the grounds that said Paragraphs fail to state a claim upon which relief can be granted in that a County in Georgia is not subject to suit based upon

negligence owing to its constitutional governmental immunity which has not been waived, either expressly or impliedly.

4.

Defendants move to strike Paragraphs 54, 55 and 59 of Count One and 2 of Count Three from the Complaint on the ground that said Paragraphs fail to state a claim upon which relief can be granted in the following particulars:

[50]

(a) Plaintiff cannot be a third-party beneficiary to the contracts claimed in said Paragraphs to have been breached by these Defendants since there is no intent in such contracts to confer upon third persons the type of benefits claimed by plaintiff in this action;

(b) Plaintiff cannot recover as a third-party beneficiary for the breach of said contracts on the basis of their Complaint, the allegations of which considered as a whole, clearly fail to allege any breach of contracts;

(c) Plaintiff cannot recover the damages sought as a third-party beneficiary to the contracts because a third-party beneficiary's rights under any contract are no greater than the rights of the parties themselves, and the contracts which Plaintiff alleged to have been breached in said Paragraphs confer no right on any party to recover the damages sought in the Complaint.

5.

Defendants move to strike Paragraphs 62 and 63 from Plaintiff's Complaint on the grounds that said Paragraphs fail to state a claim upon which relief can be granted in that the statutes, ordinances, and regulations recited in said Paragraphs do not create in Plaintiff a cause of action against these Defendants.

WHEREFORE, the Defendants, DEKALB COUNTY, GEORGIA, A. C. GUHL, WILLIAM A. WILLIAMS, T. M. CALLAWAY, JR., HOKE CLAYTON SMITH, ROBERT J. MORRIS, HORIS A. WARD, and W. M. COOLIDGE, pray that their Motion be inquired into and sustained.

Respectfully submitted,

HARVEY, WILLARD & ELLIOTT

By: /s/ WENDELL K. WILLARD
WENDELL K. WILLARD

125 Trinity Place
Decatur, Georgia

[51]

LONG, WEINBERG, ANSLEY & WHEELER

By: /s/ MEADE BURNS
MEADE BURNS

By: /s/ F. CLAY BUSH
F. CLAY BUSH

3000 The Equitable Building
Atlanta, Georgia 30303
525-5903

[53] (Caption omitted in printing)

[53] Filed: Apr. 15, 1974

MOTION TO DISMISS

Now come DEKALB COUNTY, GEORGIA, A. C. GUHL, T. M. CALLAWAY, JR., HOKE CLAYTON SMITH, ROBERT J. MORRIS, [54] HORIS A. WARD, and W. M. COOLIDGE, some of the Defendants in the above-styled action, and move the Court, pursuant to Rule 12, Federal Rules of Civil Procedure, for the dismissal of the Complaint, showing the Court as follows:

1.

The Complaint fails to state a claim or cause of action against DeKalb County, Georgia, upon which relief can be granted.

2.

None of the claims asserted against Defendant, DeKalb County, Georgia, can be granted owing to its constitutional governmental immunity which has not been waived, either expressly or impliedly.

3.

More particularly, DeKalb County, Georgia, shows the Court that the Complaint fails to state a claim upon which relief can be granted in the following respects:

(a) In Georgia, no right of action will lie against a County for the creation, and/or maintenance of a nuisance;

(b) Plaintiff cannot recover against DeKalb County, Georgia, on a theory of negligence as a matter of law owing to said Defendant's constitutional governmental immunity from suit which has not been waived, either expressly or impliedly;

(c) The statutes, ordinances, and regulations recited in the Complaint do not create in Plaintiff a cause of action against this Defendant;

(d) DeKalb County, Georgia maintains the DeKalb-Peachtree Airport as a governmental function, and, as such, is constitutionally immune from suit by this Plaintiff.

(e) There is no right of action in Plaintiff, as a third-party beneficiary on any alleged breach of any Federal Grant Agreements entered into by and between DeKalb County, Georgia, and the Federal [55] Aviation Administration because there is no intent made manifest within such Federal Grant Agreements to confer upon third persons the type of benefit claimed by Plaintiff in this action;

(f) Even if the Federal Grant Agreements entered into by and between DeKalb County, Georgia, and the Federal Aviation Administration were intended to benefit the public in the manner claimed by Plaintiff, the Complaint shows on its face that these Federal Grant Agreements had not been breached by DeKalb County, Georgia, in operating a sanitary landfill on property contiguous to DeKalb Peachtree Airport in that the Federal Aviation Administration is alleged to have had knowledge of and thus to have consented to and consciously allowed the maintenance of said landfill;

(g) Even if Plaintiff otherwise had the right to sue as a third-party beneficiary for an alleged breach of the Federal Grant Agreements entered into by and between DeKalb County, Georgia, and the Federal Aviation Administration, Plaintiff cannot recover the damages sought stemming from the alleged breach because a third-party beneficiary's rights under any contract are no greater than the rights of the parties themselves, and the Federal Grant Agreements which Plaintiff alleges to have been breached confers no right

on any party to recover the damages sought in the Complaint.

WHEREFORE, Defendant, DEKALB COUNTY, GEORGIA, A. C. GUHL, T. M. CALLAWAY, JR., HOKE CLAYTON SMITH, ROBERT J. MORRIS, HORIS A. WARD and W. M. COOLIDGE, pray that their Motion be inquired into and sustained and that the Complaint be dismissed as to them.

(Signature omitted in printing)

 (Caption omitted in printing)

ANSWER OF DEKALB COUNTY, GEORGIA, AND THE CHAIRMAN AND MEMBERS OF THE BOARD OF COMMISSIONERS OF ROADS AND REVENUES OF DEKALB COUNTY

Come now DeKalb County, Georgia, and the Members of the Board of Commissioners of Roads and Revenues of DeKalb County, Georgia, including the Chairman thereof, and respond to the Complaint of Plaintiff as follows:

COUNT ONE

1.

These Defendants are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 1, 6, 7, 8, 9, 12, 15, 17, 31, 32, 33, 35, 37, 49, 61, 69 and 70 of Count One of the Complaint of Plaintiff.

2.

These Defendants respond to Paragraph 2 of Count One as follows:

(a) The allegations of subparagraph (a) of Paragraph 2 are admitted.

(b) DeKalb County, Georgia admits it is a political subdivision of the State of Georgia and is located within the Northern District of Georgia. Responding further, these Defendants deny the remainder of the allegations of subparagraph (b) of Paragraph 2 of the Complaint.

(c) The Chairman and Members of the Board of Commissioners of Roads and Revenues of DeKalb

[105]

County admit that each is a citizen of Georgia and resides within the Northern District of Georgia, but each denies he is subject to the jurisdiction of this Court in this action.

[106]

(d) The American Home Assurance Company denies that it is subject to the jurisdiction of this Court in this action.

3.

These Defendants admit the allegations contained in Paragraphs 4, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 34, 39, 47 and 51 of Count One of the Complaint.

4.

These Defendants admit the allegations contained in Paragraph 14 of Count One of the Complaint.

5.

The allegations contained in Paragraphs 10, 11, 13, 19, 20, 36, 41, 44, 55, 56, 57, 63, 64, 65, and 67 of Count One of the Complaint are denied by these Defendants.

6.

Responding to Paragraph 3 of Count One of the Complaint, these Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph (a). Responding further, these Defendants deny the allegations of subparagraphs (b) and (c) of Paragraph 3.

7.

Responding to paragraph 5 of Count One of the Complaint, these Defendants admit on February 26, 1973 at approximately 10:12 a.m., E.S.T., a Learjet Model 24 air-

[107]

craft, N-454RN, was in the process of taking off from Runway 20L at DeKalb-Peachtree Airport. Responding further, these Defendants deny the remainder of the allegations contained in Paragraph 5 of Count One of the Complaint.

[107] 8.

Responding to Paragraph 16 of Count One of the Complaint, these Defendants admit the Atlanta Flight Service Station is a facility operated, supervised and manned by Defendant, FAA, for the purpose, among other things, of recording and filing of flight plans and furnishing pilots with relevant data and information concerning weather, flight conditions and various other matters concerning safety of flight. Further responding, these Defendants are without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations of Paragraph 16 of Count One of the Complaint.

9.

Responding to Paragraph 18 of Count One of the Complaint, these Defendants admit some dead starlings or other birds were found at or near the departure end of Runway 20L. Responding further, these Defendants are without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations contained in Paragraph 18 of Count One of the Complaint.

10.

Responding to Paragraph 38 of Count One of the Complaint, these Defendants admit DeKalb-Peachtree Airport is located within the boundaries of DeKalb County on land owned by the County, and said airport is owned and maintained by the County. Responding further, the

County operates and manages certain aspects of said airport, but the operation and control of aircraft is under the jurisdiction of the FAA. These Defendants admit said airport has paved runways and airport hangars, servicing and parking facilities, a control tower with radio facilities, and [108] instrument landing system control center, and access to other radio and navigational aids. Responding further, these Defendants aver the airport is operated under the jurisdiction of the Federal Aviation Administration and aver that the airport is operated for the use and benefit of the public. Further responding, all other allegations contained in Paragraph 38 of Count One of the Complaint are denied.

11.

Responding to Paragraph 40 of Count One of the Complaint, these Defendants admit only that beginning in 1962, a portion of the land contiguous to the land utilized as an airport facility was used by DeKalb County as a landfill. Further responding, the landfill was closed in 1964 and remained closed until March, 1966. Responding further, these Defendants admit that since March, 1966, the land contiguous to that land utilized for airport facilities was utilized again for landfill purposes. Further responding, all other allegations contained in Paragraph 40 of Count One are denied.

12.

The allegations contained in Paragraphs 42 and 43 ot Count One of the Complaint are denied by these Defendants.

13.

Responding to Paragraph 45 of Count One of the Com-

plaint, these Defendants admit that the United States of America by and through the Federal Aviation Administration had the responsibility for the administration of the Federal Airport Development Act of 1970 and its predecessor, the Federal Airport Act of 1946. Responding further, these [109] Defendants aver that the various federal grant agreements speak for themselves in respect of the provisions of such federal grant agreements. Responding further, the remainder of the allegations contained in Paragraph 45 of Count One of the Complaint are denied.

14.

Responding to Paragraph 46 of Count One of the Complaint, these Defendants aver the various federal grant agreements speak for themselves in respect of the provisions of such federal grant agreements. Responding further, these Defendants admit the United States of America has certain responsibilities over the safety of DeKalb-Peachtree Airport and admit the United States of America received certain described assurances from DeKalb County, Georgia as set out in the various grant agreements. The remainder of the allegations contained in Paragraph 46 of Count One of the Complaint are denied.

15.

Responding to Paragraph 48 of Count One of the Complaint, these Defendants admit there is an airport layout plan developed by DeKalb County and approved by the Federal Aviation Administration which illustrates the development and proposed development of the airport facilities and the use of the land included within the airport boundaries. The remainder of the allegations contained in Paragraph 48 of Count One of the Complaint are denied and these Defendants aver that such airport layout plan includes "industrial use".

16.

Responding to Paragraph 50 of Count One, these Defendants admit from March 9, 1970 through February 14, 1972, [110] the Federal Aviation Administration and DeKalb County, Georgia, communicated both by letter and by conference in respect to land usage of the land utilized as an airport facility and that land contiguous thereto in respect of the sanitary landfill. Responding further, the remainder of the allegations contained in Paragraph 50 of Count One are denied.

17.

Responding to Paragraph 52 of Count One of the Complaint, these Defendants aver that the agreements entered into by the United States of America and DeKalb County will speak for themselves in respect of the contents thereof. Responding further, these Defendants admit the language quoted in Paragraph 52 of Count One is contained in agreements between the United States of America and DeKalb County, Georgia.

18.

Responding to Paragraph 53 of Count One of the Complaint, these Defendants aver that the United States of America and the Federal Aviation Administration has authority to allow changes in the airport layout plan and admit that the United States of America and the Federal Aviation Administration had knowledge of the existence of the sanitary landfill contiguous to the land utilized as an airport facility.

19.

Responding to Paragraph 54 of Count One of the Complaint, these defendants admit the quoted language is

contained in various agreements entered into by and between the United States of America and DeKalb County, Georgia.

[111] 20.

No response is required of these Defendants to Paragraph 58 of Count One of the Complaint of Plaintiff as such allegations are directed to the United States of America.

21.

These Defendants deny the allegations contained in Paragraph 59 of Count One of the Complaint and deny each and every subparagraph of Paragraph 59.

22.

No response is required of these Defendants to Paragraph 60 of Count One of the Complaint, as such allegations are directed to the United States of America.

23.

These Defendants respond to Paragraph 62 of Count One of the Complaint as follows:

(a) Georgia Code Section 11-402 contains the following definition:

> "(2) 'Airport Hazard' means any overhead power line which interferes with radio communication between a publicly-owned aircraft approaching or leaving same, or any structure or tree which obstructs the aerial approaches of such an airport or is otherwise hazardous to its use for landing or taking off."

The above definition is contained in the "Airport Zoning Act."

[111]

(b) These Defendants admit the "Airport Zoning Act" contains language that an airport hazard endangers the lives and property of users of the airport and is therefore not in the interest of the public health, public safety or [112] general welfare. Responding further, Georgia Code Section 11-403 refers to "Airport Hazard" as defined in the "Airport Zoning Act."

(c) These Defendants admit subparagraph (c) and admit Georgia Code Section 11-9902 declares that the violation of an airport zoning regulation as set out in Chapter 11-4, of the Code of Georgia, shall constitute a misdemeanor.

(d) These Defendants aver the Airport Zoning Resolution defines "Airport Hazard" as follows:

> "*Section 2. Definitions.* (2) 'Airport Hazard' means any structure or tree or use of land which obstructs the air space required for the flight of aircraft in landing or taking off at the airport or is otherwise hazardous to such landing or taking off of aircraft."

(e) These Defendants deny the allegations of Subparagraph (e).

(f) These Defendants deny the allegations of Subparagraph (f).

(g) These Defendants deny the allegations contained in Subparagraph (g).

(h) These Defendants deny Subparagraph (h).

Further responding to Paragraph 62 of Count One of the Complaint, these Defendants aver that DeKalb County, Georgia is not required by law to zone land for use by the County when that land is owned by the County.

24.

These Defendants respond to Paragraph 66 of Count One of the Complaint as follows:

[113]

(a) The allegations contained in Subparagraph (a) of Paragraph 66 are denied.

[113]

(b) Responding to Subparagraph (b) of Paragraph 66, these Defendants aver that any policy of insurance purchased by DeKalb County is a matter that concerns only DeKalb County and the insurance company issuing the policy of insurance. Further responding, Defendants admit DeKalb County purchased a policy of liability insurance, the terms, conditions and limitations of which are set forth fully in said policy of insurance, and any "Waiver of Governmental Immunity" language contained in said policy of insurance does not in anywise prevent Defendants from raising the question of the immunity of the County to suit. Further responding, these Defendants admit that the policy of insurance contains the endorsement, or rider, alluded to in subparagraph (b) of Paragraph 66.

(c) The allegations contained in Subparagraph (c) of Paragraph 66 are denied by these Defendants.

25.

Responding to Paragraph 68 of Count One of the Complaint, these Defendants deny that they were negligent in any manner. Further responding to the subparagraphs under Paragraph 68, these Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

WHEREFORE, these Defendants demand trial by jury and pray they be hence discharged without liability.

COUNT TWO

1.

Plaintiff incorporated, adopted, repeated and realleged as Paragraph 1 of Count Two the allegations of Para-

[113]

graphs numbered 1 - 70 of Count One of the Complaint and these Defendants, likewise, incorporate, adopt, repeat and [114] reallege herein by reference their responses to the allegations of Paragraphs numbered 1 - 70 of Count One as their responses to Paragraph 1 of Count Two of the Complaint.

2.

These Defendants deny the allegations contained in Paragraphs 2 and 3 of Count Two of the Complaint.

WHEREFORE, these Defendants demand trial by jury and pray they be hence discharged without liability.

COUNT THREE

1.

Plaintiff incorporated, adopted, repeated and realleged by reference as Paragraph 1 of Count Three of the Complaint the allegations of Paragraphs numbered 1 - 70 of Count One of the Complaint and these Defendants, likewise, incorporate, adopt, repeat and reallege herein by reference their responses to Paragraphs numbered 1 - 70 of Count One as their response to Paragraph 1 of Count Three of the Complaint.

2.

These Defendants deny the allegations contained in Paragraphs 2 and 3 of Count Three of the Complaint.

WHEREFORE, Defendants demand trial by jury and pray they be hence discharged without liability.

(Signature omitted in printing)

PART E

REFERENCE TO ORDERS AND JUDGMENTS IN ALL CASES

PART E

REFERENCE TO ORDERS AND JUDGMENTS IN ALL CASES

* * * * *

MIREE, NO. 76-607

* * * * *

The initial panel decision and the subsequent en banc decision by the Fifth Circuit Court of Appeals are reported at 526 F.2d 679 and 538 F.2d 643, and were reprinted by the Miree petitioners at pages A-1 through A-31 of the Appendix to their petition for writ of certiorari. For this reason, such decisions have not been reproduced in this Joint Appendix.

The order entered by the District Court dismissing the Miree complaint and the order of the District Court denying the motion for reconsideration are not reported, but both of such District Court orders, together with the final judgment entered by the District Court, were reprinted by the Miree petitioners at pages A-32 through A-47 of the Appendix to their petition for writ of certiorari. For this reason, such judgment and orders are not reproduced in this Joint Appendix.

* * * * *

PHILLIPS, NO. 76-659

* * * * *

The initial panel decision and the subsequent en banc decision by the Fifth Circuit Court of Appeals are reported at 526 F.2d 679 and 538 F.2d 643, and were reprinted by petitioner Phillips at pages 1a through 17a and 1b through 21b of the Appendix to her petition for writ of certiorari. Such decisions are not reproduced in this Joint Appendix.

[114]

The order entered by the District Court dismissing the Phillips complaint and the District Court order denying the motion for reconsideration are not reported, but such orders may be found at pages 1c through 5c and 1d through 11d of the Appendix to the Phillips petition for writ of certiorari. For this reason, such orders are not reproduced in this Joint Appendix.

The District Court judgment dismissing the Phillips complaint is neither reported nor reprinted in the Phillips petition for writ of certiorari, but such judgment is reproduced below as follows:

[536]

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JUDITH ANITA PHILLIPS, widow of David Emanuel Phillips, Deceased,

Plaintiff,

v.

UNITED STATES OF AMERICA, DEKALB COUNTY, GEORGIA,

Defendants,

UNITED STATES OF AMERICA,

Defendant and third-party plaintiff,

v.

MACHINERY BUYERS CORP. and SOUTHEAST MACHINERY, INC.

CIVIL ACTION NO. 19412

[536]

FINAL JUDGMENT PURSUANT
TO RULE 54(b)

Filed: Sept. 2, 1974

An Order having been signed by Judge William C. O'Kelley on June 27, 1974 and filed in the Clerk's Office on June 27, 1974 granting the motion of Defendant DeKalb County to dismiss the complaint for failure of plaintiffs to state a claim, further the motion by Defendants Southeast Machinery and Machinery Buyers Corporation to set aside prior order dismissing DeKalb County filed on July 3, 1974, having been denied by Order of the Court dated filed on September 25, 1974, the Court having directed entry of final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and thus having certified that there is no just reason for delay, and expressly directing entry of final judgment on said complaint the plaintiffs, it is

ADJUDGED that the action be dismissed as to the Defendant DEKALB COUNTY, that the plaintiffs, JUDITH ANITA PHILLIPS, widow of David Emanuel Phillips, deceased, take nothing and that the taxation of costs in the action shall await entry of final judgment as to all defendants.

(Signatures omitted in printing)

* * * * *

FIREMAN'S FUND, NO. 76-700

* * * * *

The initial panel decision and the en banc decision of the Fifth Circuit Court of Appeals are reported at 526

F.2d 679 and 538 F.2d 643, and were reprinted by petitioner Fireman's Fund at pages 1a through 34a of the Appendix to its petition for writ of certiorari. Thus, such decisions are not reproduced in this Joint Appendix.

The judgment of the Fifth Circuit Court of Appeals on rehearing en banc is reprinted at pages 55a through 56a of the Appendix to the Fireman's Fund petition for writ of certiorari, and such judgment is not reproduced in this Joint Appendix.

The dismissal order, and order denying motion for reconsideration, and final judgment, entered by the District Court, are not reported and are not reproduced in this Joint Appendix, but such judgment and orders may be found at pages 35a through 54a of the Appendix to the Fireman's Fund petition for writ of certiorari.

* * * * *

FIELDS, NO. 76-722

* * * * *

The initial panel decision and the en banc decision of the Fifth Circuit Court of Appeals are reported at 526 F.2d 679 and 538 F.2d 643, and are reprinted at pages 1a through 17a and 1b through 21b of the Appendix to the Fields petition for writ of certiorari. Such decisions are not reproduced in this Joint Appendix.

The order of the District Court dismissing the Fields complaint and the District Court order denying the motion for reconsideration are not reported or reproduced in this Joint Appendix, but such orders are reprinted at pages 1c through 5c and 1d through 11d of the Appendix to the Fields petition for writ of certiorari.

The final judgment entered by the District Court is neither reported nor reprinted in the Fields petition for writ of certiorari, but such judgment is reproduced below as follows:

[192]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WILLIAM MICHAEL FIELDS,

Plaintiff,

VS.

UNITED STATES OF AMERICA;
DEKALB COUNTY, GEORGIA:
A. C. GUHL, in his capacity as Chairman of the Board of Commissioners of Roads and Revenues of DeKalb County;
WILLIAM A. WILLIAMS, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
T. M. CALLAWAY, JR., in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
HOKE CLAYTON SMITH, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
ROBERT J. MORRIS, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
HORIS A. WARD, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;
W. M. COOLIDGE, in his capacity as Member of the Board of Commissioners of Roads and Revenues of DeKalb County;

CIVIL ACTION NO. C74-291-A

(Continued on Page 314)

H. F. MANGET, JR., individually and as Airport Manager of the DeKalb-Peachtree Airport; and AMERICAN HOME ASSURANCE COMPANY,
Defendants.

CIVIL ACTION NO. C74-291-A

FINAL JUDGMENT PURSUANT
TO RULE 54(b)

An Order having been signed by Judge William C. O'Kelley on June 27, 1974 and filed in the Clerk's Office on June 27, 1974 granting the motion of Defendant Dekalb County to dismiss the complaint for failure of plaintiff to state a claim, further, the motion by Movants, Southeast Machinery and Machinery Buyers Corporation to set aside prior order of the Court dismissing Defendants Dekalb County and the members and Chairman of the Board of Commissioners of Roads and Revenues of Dekalb County filed on July 3, 1974, having been denied by Order of the Court, dated filed September 25, 1974, the Court having directed entry of final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and thus having certified that there is no just reason for delay, and expressly directing entry of final judgment on said complaint against the plaintiff, it is

ADJUDGED that the action be dismissed as to Defendants, DEKALB COUNTY, A. C. GUHL, WILLIAM A. WILLIAMS, THOMAS CALLAWAY, JR., HOKE CLAYTON SMITH, R. F. MORRIS, WILLIAM COOLIDGE, HORIS A. WARD, H. F. MANGET, JR., that the plaintiff, WILLIAM MICHAEL FIELDS take

nothing and that the taxation of costs in the action shall await entry of final judgment as to all defendants.

This 25th day of September, 1974.

(Signature omitted in printing)

AMENDMENT OF FINAL JUDGMENT

In order to correct a clerical error, and pursuant to Rule 60(a), Fed. R. Civ. P., the final judgment dated and filed on September 25, 1974 in this case is hereby amended by deleting H. F. Manget from the judgment of dismissal, so that as the case now stands H. F. Manget remains as a party defendant.

It is so ordered and adjudged.

This 2nd day of October, 1974.

(Signature omitted in printing)

Supreme Court, U. S.
FILED
NOV 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-607
MIREE
v.
DEKALB COUNTY, GEORGIA

No. 76-659
PHILLIPS
v.
DEKALB COUNTY, GEORGIA

No. 76-722
FIELDS
v.
DEKALB COUNTY, GEORGIA

No. 76-700
FIREMAN'S FUND
v.
DEKALB COUNTY, GEORGIA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONSE OF DEKALB COUNTY, GEORGIA TO PETITIONS FOR WRIT OF CERTIORARI

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONSE OF DEKALB COUNTY, GEORGIA TO PETITIONS FOR WRIT OF CERTIORARI

I.

INITIAL OBSERVATIONS

Respondent, DEKALB COUNTY, GEORGIA, files this Brief in response to four (4) Petitions for a Writ

of Certiorari: *George Henson Miree, et al* v. *DeKalb County,* Number 76-607, (hereinafter "Miree" Appeal); *Judith Ann Phillips* v. *DeKalb County,* Civil Action Number 76-659 (hereinafter "Phillips" Appeal); *William Michael Fields* v. *DeKalb County,* Civil Action Number 76-722, (hereinafter "Fields" Appeal); and *Fireman's Fund Insurance Company* v. *DeKalb County,* Civil Action File Number 76-700, (hereinafter "Fireman's Fund" Appeal).

Respondent would point out that the enclosed Brief will contain its response to all four (4) of the above-noted Petitions. This inclusive response will create obvious problems with four (4) separate records and positions, which the Respondent will attempt to minimize by as few references to the separate records and contentions as possible.

II.

FACTUAL SETTING

The Petitions presently before this Court arise out of events which occurred on or about February 26, 1973. Each of the actions presently on Petition before this Court, were instituted, from November, 1973, to May, 1974, in the United States District Court for the Northern District of Georgia, Atlanta Division, against Respondent herein and the United States. Each of the Petitions alleged diversity of citizenship jurisdiction, as it related to Respondent DeKalb County, Georgia. Moreover, each of the Complaints alleged that Respondent was liable to Petitioners under the theories of negligence, nuisance, and breach of Federal Grant Agreements to which the Petitioners were alleged third party intended beneficiaries.

The Respondent, concurrently with the filing of responsive pleadings, filed Motions to Dismiss each of the subject actions, upon the theory that DeKalb County, Georgia, was immune from suit in these actions under the Constitution and Laws of the State of Georgia. The Honorable William C. O'Kelley, United States District Judge, granted the Respondent's Motions to Dismiss in unreported Orders dated June 27, 1974, and September 24, 1974. District Judge, O'Kelley held that under Georgia Law, DeKalb County, Georgia, was immune from suit in the present actions. Thus, the governmental immunity of the County precluded the present actions under the theories of nuisance, negligence, and contractual beneficiaries.

The present Petitioners, appealed the entry of judgment, to the United States Court of Appeals for the Fifth Circuit. The initial panel of Circuit Judges Godbold, Dyer and Morgan, held in *Miree* v. *United States,* 526 F.2d 679 (5th Cir. 1976), that DeKalb County, Georgia was immune from suit under the Petitioner's theories of negligence and nuisance. However, that panel split over the issue of the rights of the Petitioners as intended beneficiaries of the Federal Grant Agreements in issue. A re-hearing en banc was granted, and in *Miree* v. *United States,* 538 F.2d 643 (5th Cir. 1976), the majority of the Court adopted the previous dissent of Circuit Judge Dyer. The effect of these opinions was that the rulings of District Judge O'Kelley, and the judgment entered thereon, dismissing the Respondent from the present actions, was affirmed.

III.

STATEMENT OF THE CASE

The Respondent does question many of the "facts" listed in the various Petitions, as lacking support in the record before this Court, or the record that was before the Fifth Circuit. The Respondent will not burden this Court or utilize its limited pagination resources, by calling this Court's attention to numerous conclusory allegations and unwarranted deductions of fact set forth in the various petitions. The Respondent adopts as its factual statement, the factual recitations contained within the two (2) Orders of District Judge William C. O'Kelley, and the factual background set forth by Circuit Judge Morgan, in the panel opinion reported at 526 F.2d 679, at 681.

IV.

ARGUMENT AND CITATION OF AUTHORITY

A.

Under the Constitution and Statutes of Georgia, Respondent Is Immune from Suit in the Present Actions

In Georgia, the governmental immunity of DeKalb County, Georgia, has its basis both in the Georgia Constitution; Georgia Code Annotated Section 2-3710, (Georgia Laws 1973, p. 1489; ratified by electorate, 1974 General Election), and in the statutory law, Georgia Code Annotated Section 23-1502. The latter Code Section states, clearly and precisely, as follows:

> "A County is not liable to suit for any cause of action unless made so by statute."

Several of the Petitioners have suggested that Georgia Code Annotated Section 23-1502, is unconstitutional in its application to the facts at bar. Respondent calls

this Court's attention to the Trial Court records of each of the subject actions, where a brief review of same will evidence a lack of proper foundation for several of the Constitutional attacks in this Court. Even if the attack possesses sufficient foundation, the Supreme Court of Georgia in numerous recent decisions has shown that governmental immunity has existed in Georgia, since 1784, and that the doctrine violates neither the Georgia nor the Federal Constitutions. *Crowder* v. *Department of State Parks,* 228 Ga. 436, 185 S.E.2d 908 (1971); *Williams* v. *Georgia Power Company,* 233 Ga. 517, 212 S.E.2d 348 (1975); *Revels* v. *Tift County,* 235 Ga. 333, 219 S.E.2d 445 (1975). Moreover, the Supreme Court of Georgia has held that the recent constitutionalization of the governmental immunity doctrine in Georgia demands that the immunity rule is no longer open to judicial abrogation. *Sheley* v. *Board of Public Education,* 233 Ga. 487, 212 S.E.2d 627 (1975); *Revels* v. *Tift County,* 235 Ga. 333, 219 S.E.2d 445 (1975).

Further, reference is made in several petitions that the distinction between county and municipal immunity under Georgia Law is violative of Constitutional requirements. Even if this argument had been properly raised in the Trial Court, which Respondent contends is not the case, this argument would find little support. The Supreme Court of Georgia, as recently as 1972, unanimously held in *Troup County Electric Membership Corporation* v. *Georgia Power Company,* 229 Ga. 348, 191 S.E.2d 33 (1972), that under Georgia Law, counties are "arms of the State" bearing the State's burdens within their localities. On the other hand, municipalities, as legislative creatures, can select from the various powers and duties available, and reject those liabilities which will either be inapplicable for the

particular location or simply unwanted by the incorporators. The distinctive features and liabilities of each are rational and embedded in the law of Georgia. It should be noted that District Judge O'Kelley's opinion, as well as that of Circuit Judge Morgan, which was subsequently adopted by the en banc Court, referred to and approved this legal distinction.

B.

Petitioners' Complaints Fail To State a Claim or Cause of Action Upon the Theories of Negligence and Nuisance

Respondent will not burden this Court with extensive written argument on the Petitoners' theories of negligence and nuisance. Suffice it to say that District Judge O'Kelly and the entire Fifth Circuit Court of Appeals, including Circuit Judges Morgan and Hill from Georgia, have held that the Respondent is not liable under either of Petitioners' theories. These opinions are clearly supported by Georgia Law and require no further written argument to this point.

C.

Petitioners' Complaints Fail To State a Claim or Cause of Action Upon the Theory that Petitioners Are Third Party Intended Beneficiaries to the Federal Grant Agreements

Respondent DeKalb County, Georgia, has consistently argued that under the application of either Georgia Law or Federal Law, it is not liable to the Petitioners. The Petitioners' assertions that the majority of the Fifth Circuit Court of Appeals reviewed only Federal Law is incorrect. Judge Dyer's dissent, which was subsequently adopted, specifically noted that if Georgia Law was applied, the result would be the same. 526 F.2d, at p. 686 (footnote 1).

1.

Review Of Georgia Authority

In reviewing Georgia law, Respondent would again call this Court's attention to the previously discussed Constitutional and statutory governmental immunity of this entity. Respondent takes strong issue with the suggestions contained in several petitions and the dissent of Judge Morgan, wherein it is suggested that Georgia Law would permit the present actions to proceed under the theory of an intended third party beneficiary. In Georgia, the imunity rule is unavailable to a county being sued by a contracting party for a breach of a valid contract. *Decatur County* v. *Prayton, Howton and Wood Contracting Company,* 163 Ga. 929, 137 S.E. 247 (1927). The present action does not involve contracting parties, but, on the contrary, involves strangers to the contract. With the addition of these strangers to the contract as alleged third party intended beneficiaries, the immunity and non-liability of the county is re-imposed. *Purser* v. *Dodge County,* 188 Ga. 250, 3 S.E.2d 574 (1939); *Backus* v. *Chilivis, Commissioner,* 236 Ga. 500, 224 S.E.2d 370 (1976); *Lee* v. *Petty,* 133 Ga. App. 201, 210 S.E.2d 383 (1974); *McWhirter Material Handling Company, Inc.* v. *Georgia Paper Stock Company, Inc.,* 118 Ga. App. 582, 164 S.E.2d 852 (1968), and *Williams* v. *Georgia Power,* 233 Ga. 517, 212 S.E.2d 348 (1975), [Supreme Court of Georgia re-consideration of the issues presented in *Hancock County* v. *Williams,* 230 Ga. 723, 198 S.E.2d 659 (1973), cited by dissent and Petitioners].

The above-noted decisions also hold that for a particular stranger to a contract to have standing to enforce the contract, it must be clearly manifested in the

contract that it was made for his intended benefit. Moreover, the mere fact that the third party might benefit from performance of the agreement is not sufficient. *Backus* v. *Chilivis, Commissioner, supra.* The Petitioners, as members of the public, were incidental to the contract formation, incidental to the contract execution and incidental to the contracting parties. Therefore, under Georgia Law, the Petitioners would not have sufficient standing to enforce the contract, even if the county's governmental immunity were improperly questioned. It is to be noted that the Georgia approach is consistent with and applicable of the Restatement of Contracts, Section 145.

2.

Review Of Federal Authority

Moving to a review of Federal Law, Respondent contends that its governmental immunity, created under Georgia Law, is equally applicable to any review of Federal authorities. The governmental immunity of a state or a political subdivision thereof, is not waived by its entry into a Federal area or its subjection to Federal "Overlordship", *Intracoastal Transportation, Inc.* v. *Decatur County, Georgia,* 482 F.2d 361 (5th Cir. 1973); *Red Star Towing & Transportation Company* v. *Department of Transportation of State of New Jersey,* 423 F.2d 104 (3rd Cir. 1970); *Rogers* v. *Ray Gardner Flying Service, Inc.,* 435 F.2d 1389 (5th Cir. 1970); *Williamson Towing Company* v. *Illinois,* 534 F.2d 758 (7th Cir. 1976). Any suggested reliance upon the decision in *Parden* v. *Terminal Railway Company,* 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), and its short-lived progeny, would be and is misplaced. See *Employees* v. *Department of Public Health and Welfare,* 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973), and *Edelman* v. *Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

Respondent would further contend that the Petitioners have not established, nor can they establish that they were intended beneficiaries to the Federal Grant Agreements in issue. The Restatement of Contracts, Section 145, noted previously, provides, as follows:

> "A promisor bound to the United States or to a state or municipality by contract to do an act or render a service to some or all the members of the public is subject to no duty under the contract to such members to give compensation for injurious consequences of performing or attempting to perform it, or failing to do so, unless,
>
> (a) An intention is manifested in the contract, as interpreted in light of the circumstances, surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences . . ."

The Restatement rule was clearly fashioned upon decisions such as this Court's decision in *German Alliance Insurance Company* v. *Home Water Supply Co.,* 226 U.S. 220, 33 S.Ct. 32, 57 L. Ed. 195 (1912), which required that the contract disclose a "direct" benefit to the third party, in order for that third party to have standing to enforce the contract. Numerous Federal Court decisions support this approach. *Harlib* v. *Lynn,* 511 F.2d 51 (7th Cir. 1975); *Commonwealth of Pennsylvania* v. *National Association of Flood Insurers,* 378 F. Supp. 1339 (M.D. Pa. 1974); *Stanturf* v. *Sipes,* 224 F. Supp. 883 (W.D. Mo 1963), affirmed 335 F.2d 224 (8th Cir. 1964); *Lobianco* v. *Valley Forge Military Academy,* 224 F. Supp. 395 (E.D. Pa. 1963), affirmed

331 F.2d 851 (3rd Cir. 1964), (as well as the decisions cited by Circuit Judge Dyer). This approach is very consistent with this Court's recent decision in *United States* v. *Orleans,* — U.S. —, 96 S.Ct. 1971, 48 L.Ed. 2d 390 (1976), wherein this Court unanimously held that the grantor of federal funds did not subject itself to "countless unidentifiable classes of beneficiaries," id, 48 L. Ed. 2d, at p. 399. Certainly, if the grantor is not liable to "countless unidentifiable classes of beneficiaries," the grantee of said funds, who itself is cloaked with unwaived governmental immunity, equally is not liable.

Respondent would further contend that even if this Court were to determine that the Petitioners were third party intended beneficiaries of the Federal Grant Agreements in issue, then the rights of the Petitioners are no greater than the rights of the contracting parties. The only remedies in the Grant Agreements in issue are the termination of funds by the grantor and possible enforcement of performance obligations. It is elementary law that a third party can have no greater rights than those held by the contracting parties. *Deal* v. *Chemical Construction Company,* 99 Ga. App. 413, 108 S.E. 2d 746 (1959); *Simmons* v. *Western Assurance Company,* 205 F.2d 815 (5th Cir. 1953), Thus, the rights accorded the contracting parties are not sufficient basis for the maintenance of the present death, personal injury and property damage actions.

Moreover, no private cause of action should be implied from either the silent Grant Agreements or the silent enabling legislation. *Cort* v. *Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L. Ed. 2d 26 (1975). Petitioners' assertion of the applicability of the decision in *City of*

Inglewood v. *City of Los Angeles,* 451 F.2d 948 (9th Cir. 1972), is clearly misplaced, as that case was a class action in the nature of an eminent domain or "taking" action, as it related to noise problems, and applying those principles to the facts at bar would be inappropriate. As for particular decisions in the aviation area which did not create private causes of action, see *Moungey* v. *Brandt,* 250 F. Supp. 445 (W.D. Wis. 1966); *Rosdail* v. *Western Aviation Company, Inc.,* 297 F. Supp. 681 (D. Colo. 1969); *Moody* v. *McDaniel,* 190 F. Supp. 24 (N.D. Miss. 1960); *Morrison* v. *Jack Richards Aircraft Company,* 328 F. Supp. 580 (W.D. Okla. 1971); *Rogers* v. *Ray Gardner Flying Service, Inc.,* 435 F. 2d 1389 (5th Cir. 1970); *McCord* v. *Dixie Aviation Corp.,* 450 F.2d 1129 (10th Cir. 1971); *Polansky* v. *Transworld Airlines, Inc.,* 523 F.2d 332 (3rd Cir. 1975). (as well as the decisions cited by Circuit Judge Dyer).

V.

REASONS FOR DENYING THE PETITIONS FOR A WRIT OF CERTIORARI

Respondent DEKALB COUNTY, GEORGIA, after briefly acquainting this Court with its position on the legal issues raised by the several Petitions pending before this Court, hereby sets forth its reasons why the Petitions should be denied:

1.

First and foremost, the opinion and judgment of the Honorable William C. O'Kelley, United States District Judge, Northern District of Georgia, Atlanta Division and of the United States Court of Appeals for the Fifth Circuit, are correct, as a matter of law.

2.

The opinion and judgment of District Judge O'Kelly and of the Fifth Circuit Court of Appeals, is clearly consistent with and supported by numerous Supreme Court of Georgia and Court of Appeals of Georgia decisions, cited in the earlier portions of this Brief. Moreover, each particular legal issue raised in the subject Petitions has been recently reviewed by the Appellate Courts of Georgia and adjudged against Petitioners' position herein.

3.

The opinion and judgment of District Judge O'Kelley and of the Fifth Circuit Court of Appeals is clearly consistent with and supported by a multitude of decisions of this Court and other Federal Courts, several of which have been previously cited in this Brief.

4.

Respondent further contends that with this Court's recent unanimous decision in *United States* v. *Orleans*, — U.S. — 96 S. Ct. 1971, 48 L. Ed. 2d 390 (1976), the issues that could be brought before this Court in the subject Petitions, are resolved and, therefore, are without significance.

5.

Respondent lastly contends that no significant or unique questions surrounding either the Federal Constitution or Constitution of Georgia are properly brought before this Court or are properly before this

Court, requiring any substantative resolution by this Court.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-607

GEORGE HENSON MIREE, CLAUDE ESTES MIREE and DOROTHY ESTES MIREE, Minors, by and Through AUBREY S. MIREE, JR., and CLAUDE H. ESTES, JR., Co-Guardians of Said Minors,
Petitioners,

versus

DEKALB COUNTY, GEORGIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONERS

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Pettibone v. Cook County, 120 F. 2d 850 (8th Cir. 1941) 11, 35

Polansky v. Transworld Airways, Inc., 523 F. 2d 332 (1975) 12

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Other Authorities Cited

Restatement (First) of Contracts (1932) § 145 ..... 15, 21, 26, 29, 31, 32

Restatement (Second) of Contracts, Tentative Draft No. 3 (April 18, 1976) § 145 ..... 33, 34

2 Williston, Contracts §§ 374, 375 (3d Ed.) 32

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-607

GEORGE HENSON MIREE, CLAUDE ESTES MIREE and DOROTHY ESTES MIREE, Minors, by and Through AUBREY S. MIREE, JR., and CLAUDE H. ESTES, JR., Co-Guardians of Said Minors,
Petitioners,

versus

DEKALB COUNTY, GEORGIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Miree v. United States*, 526 F. 2d 679 (1976). The en banc opinion, reversing the panel majority opinion in part, is reported at 538 F. 2d 643 (1976).

GROUNDS UPON WHICH JURISDICTION IS INVOKED

Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals from which review is sought was rendered on August 25, 1976. Petition for certiorari was timely filed on October 30, 1976 and such petition was granted by the Court on January 17, 1977.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution Amendment XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

The Rules of Decision Act (Section 34 of the Judiciary Act of 1789)

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

(1 Stat. 92; 28 U.S.C. § 1652)

Airport and Airway Development Act of 1970, Section 18 [In Part]

As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him, that—

* * * * * * * *

(3) the aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

(4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft;

(84 Stat. 219; 49 U.S.C. § 1718)

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether federal common law governs rights of intended third-party beneficiaries to a contract between the United States and a Georgia County for development and operation of an airport in commerce; and whether federal common law permits suits by such beneficiaries against the County for deaths caused by the County's breach of safety provisions contained in such contract.

2. Whether the County, by operating an airport in the federally preempted sphere of interstate air commerce, loses its

state-law immunity from suit for its own negligent and wanton misconduct.

3. Whether a civil remedy exists under the federal aviation acts for death or injury caused by flagrant breach of statutory safety standards in such acts.

4. Whether a United States District Court, sitting in diversity, can dismiss claims of plaintiffs who have standing to sue as third-party beneficiaries under the law of the forum state, by applying a more restrictive federal common law test for third-party beneficiary standing.

STATEMENT OF THE CASE

Petitioners are the three minor children of Mr. and Mrs. Richardson F. Miree. Their father and mother were passengers in a jet airplane which crashed shortly after take-off from the DeKalb-Peachtree Airport, in DeKalb County, near Atlanta, Georgia, on February 26, 1973. The parents were both killed, and the three minor children sue by their guardians. The cause of the crash was the ingestion of birds into the plane's jet engines as the plane cleared the end of the runway at take-off. Large flocks of birds were at the site, having been attracted by a garbage dump on the airport property immediately adjacent to the runway. The airport, including both the aviation facilities and the garbage dump, was owned and operated by DeKalb County.

The Miree children sued DeKalb County, as well as the corporate owners of the aircraft, and sued the United States, as the regulator of safety in all air travel and as operator of the control tower at the airport. A final order of the District Court dismissed the County on its pretrial motion to dismiss, on account of supposed governmental immunity from suit. (Appendix to Petition for Certiorari, A-32, A-37). [The two orders of the

District Court, and the two opinions of the Court of Appeals were an appendix to our Petition for Certiorari and are not recopied into the Appendix here. Rather, they are cited herein as "A.P.C. . . . ." References to the printed appendix are cited herein as "A. . . . ."]. The United States had filed cross-claims against the County, and those have not been dismissed.

The complaint (A. 9) sets forth facts supporting liability of the County on several grounds. Facts amounting to maintenance of a nuisance are alleged; negligence and wanton misconduct in permitting the garbage dump and its birds to remain near a jet runway are shown; misconduct in allowing a jet aircraft to take off at this particular time when flocks of birds were known to be in the area of the runway is shown; and it is pleaded (A. 19) that maintenance of the garbage dump is in direct violation of a written contract ("grant agreement") between the County and the United States, of which contract these users of the airport were intended third-party beneficiaries. The grant agreement was authorized by Georgia's Uniform Airport Act (Ga. Code Section 11-204 *Et Seq.*).

The contract between the Federal Aviation Agency and DeKalb County ("the grant agreement") was exhibited to the petitioners' complaint (A. 26), and the following specific provisions in the contract were further pleaded in the body of the complaint (A. 18) in support of our position that the petitioners are shown by its terms to have been intended beneficiaries of the contract:

> "The Sponsor will operate the Airport as such *for the use and benefit of the public*. . . . That the Sponsor may prohibit or limit any given type, kind or class of aeronautical use of the Airport if such action is necessary for the *safe operation of the Airport or necessary to serve the civil aviation needs of the public*." (Project Application, Sponsor's Assurances, Paragraph 2). (Emphasis added).

and

"The Sponsor will operate and maintain in *a safe and serviceable condition* the Airport and all facilities thereon and connected therewith which are necessary *to serve the aeronautical users of the Airport* other than facilities owned or controlled by the United States, and *will not permit any activity thereon which would interfere with its use for airport purposes.*" (Project Application, Sponsor's Assurances, Paragraph 6). (Emphasis added).

and

"In addition, the Sponsor will not erect or permit the erection of any permanent structure or facility which would interfere materially with the use, operation, or future development of the Airport, in any portion of a runway approach area in which the Sponsor has acquired, or may hereafter acquire, property interests permitting it to so control the use made of the surface of the land." (Project Application, Sponsor's Assurances, Paragraph 7).

and

". . . The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the FAA, if such changes or alterations might adversely affect the safety, utility, or efficiency of the Airport." (Project Application, Sponsor's Assurances, Paragraph 12).

and

"Insofar as is within its power and to the extent reasonable, *the Sponsor will take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and take-off of aircraft.*" (Project Application, Sponsor's Assurances, Paragraph 13). (Emphasis added). (A. 19).

Moreover, the fact of the County allowing the garbage dump and the associated bird hazard to continue, with full knowledge of the hazard to jet aircraft, and the continued allowing of jet aircraft traffic during a time when flocks of birds were known to be present, and known to be attracted by reason of the County's own open garbage dump on property owned by the County adjacent to the runway, are allegations of fact supporting a finding of wilful and wanton misconduct by the County.

Such conduct by the County clearly violated the Airport and Airway Development Act of 1970, 84 Stat. 219, 49 U.S.C. §1701 et seq., pursuant to which the above quoted "Sponsor's Assurances" were made. The statute requires, at 49 U.S.C. §1718, assurances which include:

> (3) the aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;
>
> (4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft;

The Complaint, at ¶28 (A. 21) alleges that "The maintenance of said garbage dump at said DeKalb-Peachtree Airport constituted an airport hazard as defined in 49 U.S.C. 1101, 49 U.S.C. 1711, and was a violation of 49 U.S.C. 1110(3) and 49 U.S.C. 1718(3)."

The facts alleged further supported a conclusion that the County, by engaging in the business of running a full-service commercial airport facility, was engaged in a proprietary function in a federal sphere of activity in interstate commerce which

resulted in an effective loss of any immunity from suit. This was averred in detail in an amendment to the Complaint (A-67, 68).

Upon the District Court granting the motion of the County to dismiss (orders of June 27, 1974 and September 25, 1974, A.P.C. 37 and A.P.C. 32, respectively) the Miree plaintiffs took an appeal to the United States Court of Appeals for the Fifth Circuit.

That appeal was heard by a panel of Judges Morgan, Godbold, and Dyer. Judge Morgan (himself a Georgia lawyer and former U.S. District Judge in Georgia) wrote the opinion of the panel, for himself and Judge Godbold (A.P.C. 16). The decision is reported in 526 F. 2d 679 (1976). Judge Dyer dissented. The majority opinion, while finding that plaintiffs' negligence and nuisance claims were barred by the County's tort immunity, held that the plaintiffs had stated a claim as third-party beneficiaries of the contract between the Federal Aviation Administration and DeKalb County, citing Georgia's statutory and case law as applicable, which holds that counties are not immune from suit on contracts, including suits by intended third-party beneficiaries. Judge Dyer's dissent (A.P.C. 27) contended that because the contract in question was entered pursuant to federal statute, and because the United States was a party, federal law must control its interpretation. He contended that under federal common law, the contract would have to manifest not only an intent to benefit the plaintiffs (which is the requirement of Georgia law, clearly met by the language of the grant agreement) but also must manifest expressly an intent to compensate them in the event of its breach.

After publication of the panel opinion, the Court of Appeals granted rehearing en banc on motion of the County. Its opinion (A.P.C. 1) is reported at 538 F. 2d 643 (1976). Of the thirteen memebsr of the en banc Court, seven adopted as the opinion of the Court, *per curiam*, Judge Dyer's dissent from the panel

opinion. One further member of the Court concurred (A.P.C. 3). Five members of the Court, including Chief Judge Brown, dissented in an opinion by Judge Morgan (A.P.C. 3); and the Chief Judge also dissented separately (A.P.C. 13).

SUMMARY OF ARGUMENT

The *Miree* Petition for Certiorari presented four bases for permitting an action against defendant DeKalb County, Georgia. Two of these were considered by the Court of Appeals and found substantial support in dissents from the en banc opinion. Two were argued below but were not mentioned in the Court of Appeals opinions. A favorable ruling here on any of the four issues would allow the surviving Miree children to sue DeKalb County, Georgia. The Court here could either: (1) find that a federal common law third-party beneficiary rule permits suit by intended third-party beneficiaries of the contract between the United States and the County. This was Chief Judge Brown's position in his separate dissent; or (2) find that the County waived immunity by entering the federally preempted sphere of interstate air commerce; or (3) acknowledge an implied civil remedy for death or injury caused by flagrant breach of federal statutory aviation safety standards; or (4) find that the Georgia third-party beneficiary rule, permitting the action, applies in this diversity case. The latter was the position taken by four other dissenting members of the en banc Court of Appeals. The balance of this summary will state the petitioners' argument on these four bases for liability.

1. **Federal Common Law Permits Suits by Intended Third-Party Beneficiaries of Contracts, and Is Applicable Here Because the United States Was a Party to the Contract, Is a Party to the Lawsuit, and Important Federal Interests Are Served by Application of a Federal Rule Permitting Such Actions.**

The grant agreement executed between the United States and DeKalb County, Georgia (A. 26), which is the contract sued upon here, contains as its first substantive statement at Part III, Sponsor's Assurances, ¶2, the following language:

> The Sponsor [County] will operate the Airport as such for the use and benefit of the public . . . to serve the civil aviation needs of the public. (A. 36)

The federal cases which have considered standing of third-party beneficiaries to sue on contracts to which the United States is a party clearly allow actions by intended third-party beneficiaries. In failing to recognize that, the Court of Appeals for the Fifth Circuit here ignored its own decision in *Bossier Parish School Board v. Lemon*, 370 F. 2d 847 (5th Cir. 1967), an opinion by Judge Wisdom, joined by present Chief Judge Brown, and by Chief Justice Burger, then sitting from the District of Columbia Circuit. In that case the Department of Health, Education and Welfare gave money to the county school board in exchange for assurances that children from a federal base would be admitted to the school. The Court held:

> Defendants by their contractual assurances have afforded rights to these federal children as third-party beneficiaries concerning the availability of public schools (page 850).

In *City of Inglewood v. City of Los Angeles*, 451 F. 2d 948 (9th Cir. 1972), the Ninth Circuit considered federal aviation grant agreements with respect to Los Angeles Airport, and found that the residents of the area were intended third-party

beneficiaries, and as such had standing to sue for breach of the agreements.

It is beyond argument that the federal policy interest here is uniform applicability of the highest possible safety standards in civil aviation. Such aviation is a federally preempted area of regulation. A uniform rule is necessary with respect to standing of injured parties, or their survivors, to sue for violation of safety provisions and regulations; and such a federal rule should permit intended third-party beneficiaries to sue, in line with modern third-party beneficiary decisions generally, and consistent with the two cases noted just above.

2. **A County in Partnership With the United States in Operation of an Airport, a Federally Preempted Sphere of Interstate Commerce, Loses Its State-Law Immunity From Suit for Its Own Negligent and Wanton Misconduct.**

Counties, unlike states, do not enjoy Eleventh Amendment protection, and may be sued in federal court. *Lincoln County v. Luning*, 133 U.S. 529 (1890); *Pettibone v. Cook County*, 120 F. 2d 850 (8th Cir. 1941). The County's immunity here is purely a doctrine of state law. The Court below applied federal common law to *deny* petitioners a remedy (the third-party beneficiary remedy) which they *did* have under state law, and at the same time *embraced* state law insofar as it gave tort immunity to the respondent County.

This Court has held that even a state itself can lose immunity by entering a federal sphere of interstate commerce. *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184; reh. denied, 377 U.S. 1010 (1964). *Parden* was followed in 1964 in *Chesapeake Bay Bridge and Tunnel District v. Lauritzen*, 404 F. 2d 1001 (1968), where the Fourth Circuit found a waiver of state immunity from the state's entry into maritime commerce.

Then in 1970 the Tenth Circuit in *Briggs v. Sagers*, 424 F. 2d 130 (1970), cert. denied 400 U.S. 829, found that the Fair Labor Standards Act applied to a state-owned institution in Commerce; and in *Pennsylvania Environmental Council, Inc. v. Bartlett*, 454 F. 2d 613 (1971), the Third Circuit, in dictum, stated: "A state may, by engaging in activities of paramount federal interests, waive its immunity under the Eleventh Amendment . . . whether such a waiver has taken place is a question of federal law" (454 F. 2d at 624-625). *A fortiori* the immunity of a *county*, which is a state-created immunity, not of federal Constitutional origin, can be so waived. Moreover, if federal common law is to be applied, then state law immunity is not applicable in any event.

3. **An Implied Civil Remedy Exists Under the Federal Aviation Acts for Death or Injury Caused by Flagrant Breach of Federal Statutory Safety Standards.**

There are some Court of Appeals cases which refuse to imply such a civil remedy with respect to activity not involving fault, or activity not related to personal safety matters, and the like. These include *Rogers v. Ray Gardner Flying Service, Inc.*, 435 F. 2d 1389 (5th Cir. 1970) reh. denied, cert. denied 401 U.S. 1010, where it was unsuccessfully sought to create vicarious bailor liability without fault; *Polansky v. Transworld Airways, Inc.*, 523 F. 2d 332 (1975), where passengers sued complaining about allegedly inferior tour accommodations; and the recent decision in *Rauch v. United Instruments, Inc.* (U.S. Court of Appeals for the Third Circuit, 12/30/76) 44 L.W. 2333. The Third Circuit in *Rauch* expressly noted that it was not ruling on the case "with actual victims" of an accident. Aside from these peripheral cases, which do not involve strong public policy issues, several district courts have, for some years, recognized an implied federal civil right of action in favor of one injured or killed by defendants' violation of aviation safety standards.

These cases include *Town of Easthaven v. Eastern Airlines, Inc.*, 282 F. Supp. 507 (D. Conn. 1968); *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Calif. 1972); and *In Re Paris Air Crash*, 399 F. Supp. 732 (C.D. Calif. 1975) We urge this Court to acknowledge the civil remedy in the case of death or injury directly resulting from flagrant breach of federal statutory safety standards.

4. **The United States District Court, Sitting in Diversity, Must Grant Standing to Sue to Parties Who Have Such Standing, as Contract Third-Party Beneficiaries, Under Applicable State Law.**

The captioned proposition is irrefutably true in the ordinary case. The opposite result has been reached below here by the process of (a) finding that there were strong federal interests involved, and then (b) finding that when such strong interests are involved, "federal common law" must apply, despite *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and then (c) finding that federal common law includes a very restrictive rule for third-party beneficiary standing, which standard the Court then finds plaintiffs cannot, as a matter of law, meet.

The cruel irony of achieving that result, by that reasoning, is that the real federal interest here, in promoting aviation safety, is an interest ill served by creating a shield of federal law to protect a county, operating an airport under a federal grant agreement, from liability for its own gross fault, when its own state law would not so shield it.

There is here a sub-issue of importance if the Court should determine that the state law rule on third-party beneficiary standing is the law to be applied. In such event we must ask the Court here to adopt Judge Morgan's conclusion that under the language of the grant agreement ("for the use and benefit of the public . . . safe operation . . . to serve the civil aviation needs

of the public; . . . to serve the aeronautical users of the Airport") the petitioners or their decedents were "intended" beneficiaries, which both Judge Dyer's opinion and Judge Morgan's opinion acknowledge to be the Georgia law requirement; and are not mere "incidental" beneficiaries as a matter of law, as Judge Dyer said in his panel dissent which the en banc Court of Appeals adopted *per curiam*.

ARGUMENT

1. Federal Common Law Permits Suits by Intended Third-Party Beneficiaries of Contracts, and Is Applicable Here Because the United States Was a Party to the Contract, Is a Party to the Lawsuit, and Important Federal Interests Are Served by Application of a Federal Rule Permitting Such Actions.

A. Background on This Issue

The issue of whether a federal common law rule on third-party beneficiary standing ought to apply to this case was not developed by any of the parties at the district court level, nor was it briefed or argued by any party, if memory serves, before the Fifth Circuit panel. The Miree petitioners urged the Court of Appeals, in the alternative, either to apply the Georgia third-party beneficiary rule (which we felt would clearly permit the action), or to find that the county waived immunity by its entry into a federally preempted sphere of interstate commerce, or, thirdly, to recognize a civil remedy under the federal aviation acts.

The issue of applicability of federal common law, and the finding of a possible federal common law third-party beneficiary rule, was raised by Judge Dyer in his panel dissent (A. P.C.-27), which argued that federal common law should apply, and that it was identical with the old Restatement (First) of Contracts, § 145 (1932) rule, which requires not only that the contract show the plaintiffs as intended third-party beneficiaries, but also show a specific intent that such beneficiaries be compensated for damages. After en banc hearing, the Court of Appeals adopted Judge Dyer's dissent, *per curiam*, as the opinion of the Court.

Petitioner's real interest here with respect to the third-party beneficiary issue is, of course, in being permitted to sue the County, and whether this comes about by recognition and ap-

plication of a federal or a state law rule is academic to the Miree petitioners themselves, as guardians of the three minor children whose parents died in the crash. But as counsel we have found it frustrating to have the Court below *ignore* federal policy interests in eliminating immunity from suit in aviation commerce, and *ignore* federal policy interests in possibly recognizing a civil remedy under the aviation laws; and then spontaneously adopt, *per curiam*, a restrictive and archaic supposed federal common law rule; and apply it, moreover, on the grounds that imperative federal interests compel that *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), not apply!

Thus we are in something of a quandary as to how to treat the issue of applicability of federal common law here; our embrace of it is tentative, conditioned upon the Court finding that it is not what Judge Dyer said it is. We will show in some detail that the cases relied upon by the Court below are not authority for the result reached, and that the federal common law rule actually is identical to the more liberal Georgia rule.

B. Analysis of the Cases Cited by the Court of Appeals on This Issue

Judge Dyer's opinion, which is now the *per curiam* opinion of the en banc Fifth Circuit, holds that federal common law is applicable by authority of *United States v. Seckinger*, 397 U.S. 203 (1970); *Smith v. United States*, 497 F. 2d 500 (5th Cir. 1974); and *First National Bank v. Small Business Administration*, 429 F. 2d 280 (5th Cir. 1970). He finds that these cases hold that federal common law should control "the contract's interpretation," (A. P.C.-27), in the case of a contract to which the United States is a party.

We submit that a fair reading of those cases suggests that federal common law will not be applied to achieve a result which serves federal interests more poorly than otherwise-applicable

state law, nor will it be applied in a way which in result achieves a harsh *lack* of uniformity with the law generally rather than furthering uniformity of decision.

In fact federal policy is opposed to immunity of governmental units from tort or contract claims—the United States has itself consented to be sued here; it makes no sense to say that federal interpretation must grant a Georgia County immunity from suit, by imposing a stricter test for third-party beneficiary standing than Georgia's own courts do. A suit against a county is *not* a suit against a state, where the Eleventh Amendment creates Constitutional immunity. *Lincoln County v. Luning*, 133 U.S. 529 (1890). It is our position in this Part 1 of our argument that federal common law should be applied here; and that federal interests in the interpretation of the airport grant agreement here require a finding that the contract language, e.g.: "[the County] will operate the Airport as such for the use and benefit of the public . . . to serve the civil aviation needs of the public" grants petitioners standing to sue on the contract for damages, under a federal common law contract rule. Chief Judge Brown, in his separate dissent (A.P.C.-13) felt that "federal law not only does not preclude the plaintiffs below from recovering as third-party beneficiaries, but that federal law **compels** this result."

United States v. Seckinger, Judge Dyer's only Supreme Court authority, holds that federal law controls interpretation of a contract between the United States and a private party entered pursuant to United States statutes, in a controversy between them as to its interpretation—namely, the right of the United States to seek indemnity from the contractor. Our case is different in that the County here was a party to the contract not only by reason of the federal aviation law but also pursuant to a Georgia statute, (The Georgia Uniform Airport Act, Ga. Code 11-204 *et seq.*), and we do not have in issue in this appeal the right of the United States to look to the County for indemnity but rather

the right of the users of the Airport to sue the County for damages for the County's breach.

Smith v. United States, 497 F. 2d 500 (5th Cir. 1974), the second of these cases cited by Judge Dyer (A.P.C.-27), was a case where employees of a subcontractor sued the United States and the prime contractor for damages for injury. The Court held that the United States was entitled to indemnity from the prime contractor even as to the United States' own negligence. The decision in *Smith* does not elucidate what it means to conclude that federal law controls. At page 508 of the opinion the court notes that there are some state cases with a somewhat different rule with respect to establishing indemnity when there is mutual negligence, but at page 509 the court notes that state decisions are often helpful in deciding federal questions, "but not when the Supreme Court has indicated a contrary view." The case indicates to us that a court dealing with interpretation of a contract to which the United States is a party will look to federal interests, and to both federal and state decisions, in reaching an appropriate result.

In *First National Bank v. Small Business Administration*, 429 F. 2d 280 (5th Cir. 1970), the third case relied upon in this section of Judge Dyer's opinion (A.P.C.-28), the Bank sued the Small Business Administration to enforce a loan guaranty agreement. The Fifth Circuit, on the question of liability under a loan guaranty, held that federal law

> controls the rights of the parties . . . by this we do not mean that a different result might be reached under the law of Texas, for the parties have given us no indication that the state would apply a different standard from the one we adopt. In a contract suit where the United States is a party as a general rule the contract principles of federal law govern. (page 286)

The Court goes on:

> The reason behind the rule of uniformity of decision is plainly applicable to the instant case. The policy manifested in the Small Business Act is national in scope . . . "the desirability of a uniform rule is plain." (pages 286-287).

This case, too, we submit, stands for a rule that in construing contracts to which the United States is a party, the court will look both to state cases and federal cases, and will reach a result which promotes both federal substantive policies and a federal policy of uniformity of decision.

In our case, application of Judge Dyer's federal common law rule, which we will show is clearly not the correct rule, would, on the contrary, promote *non*-uniformity. Most of the entities with which the United States makes grant agreements for airport development (municipalities, authorities, etc.) do not claim to have immunity at all. The result of Judge Dyer's rule would be to "federalize" for this one airport, or a few airports operated by entities which claim immunity, the condemned and archaic doctrine of governmental immunity.[1]

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[1] We have attempted to compile informally some data with respect to the number of airports which do claim immunity. The U.S. Department of Transportation, Federal Aviation Administration, publishes an annual report, *FAA Air Traffic Activity*. Table 5 for fiscal year 1976 thereof lists all airports with FAA control towers in order of "total aircraft operations." DeKalb-Peachtree (the airport in question here) was eightieth in terms of such operations.

We took as samples the top ten airports in terms of such "total aircraft operations" and the nineteen airports just larger than DeKalb-Peachtree. We then spoke by telephone to management or counsel for these airports (except we omitted several in California as the California rule of non-immunity became clear). We found that none of the top ten airports (including, as number five, Atlanta International) claims to have immunity from suit. With respect to airports ranked 61 through 79 (those just larger than DeKalb) we found that of these nineteen, fourteen definitely do not claim to have immunity. Of the remaining five, Boise Air Terminal, operated by the City of Boise, Idaho, notes that state law provides only for immunity from "governmental" activity, and that they carry $1,000,000 of liability

Moreover, it would do so when Georgia itself, in its own statute on third-party beneficiary standing, and in its own judicial decisions, has carved out at least this contract exception to the general rule of county immunity which does still prevail in Georgia.

If, however, the federal common law rule of third-party beneficiary standing is found to permit standing, as Georgia's rule would, and as the federal cases we cite later in part C of this Part 1 clearly hold, and as most modern cases from most jurisdictions would, then application of a federal common law rule would serve both valid federal purposes: It would bring the result in this case in line with what the result would have been if the crash had taken place at most other airports (i.e., the "sponsor" would have liability for its wanton or negligent acts) and thus would promote uniformity of decision; and it would, by avoiding application of immunity, promote the federal interest in encouraging air safety. Such a result would bring the decision into line with the law generally, and it would create a method for imposing contract liability on those few airport-operating entities which still assert tort immunity.

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insurance, which has paid with respect to non-aircraft accidents. Cleveland-Hopkins International Airport is operated by the City of Cleveland, Ohio, and the office of the City Attorney acknowledges that the airport operation is probably "proprietary" and therefore not immune under Ohio law. The Cleveland airport carries liability insurance. Baltimore-Washington International Airport is operated by Maryland, and an assistant attorney general there advises that there is immunity under state law, but that as a matter of policy it is not ordinarily pleaded. Norwood (Mass.) Memorial Airport, according to Town Counsel, would have immunity under state law if the activity was deemed "governmental," and he reports that the issue has not arisen. The response on behalf of Beverly (Mass.) Municipal, from the City Solicitor there was essentially identical to that of Norwood, Mass.; but he commented that the activity of the airport would probably be proprietary. Assuming that airport operation would in any case be deemed "proprietary," it appears that of the sample surveyed, only Baltimore-Washington International

We disagree with Judge Dyer's reading of the federal cases, and do not find that the federal cases clearly support the position of Restatement (First) of Contracts, §145 (1932), which says in effect that the contract must not only manifest an intent to benefit the plaintiff but must specifically manifest an intent to *compensate* the plaintiff. This is concededly *not* the law in Georgia, nor in most jurisdictions; and we submit that it is not the rule of federal common law.

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might have some other state law basis for claiming immunity, but that such immunity is normally not asserted.

In tabular form, our survey can be summarized as follows:

Airport	*State*	*Rank*	*Immunity*
Chicago O'Hare Int'l	IL	1	No
Santa Ana	CA	2	No
Van Nuys	CA	3	No
Long Beach	CA	4	No
Atlanta Int'l	GA	5	No
Los Angeles Int'l	CA	6	No
San Jose Municipal	CA	7	No
Torrance Municipal	CA	8	No
Phoenix Sky Harbor Int'l	AZ	9	No
Opa Locka	FL	10	No
St. Petersburg Clearwater	FL	61	No
Daytona Beach	FL	62	No
Chicago Palwaukee	IL	63	No
Beverly Municipal	MA	64	See text above
Boise	ID	65	See text above
Tucson	AZ	66	No
Fresno Air Terminal	CA	67	No
Cleveland Hopkins Int'l	OH	68	See text above
Baltimore Washington Int'l	MO	69	See text above
Napa County	CA	70	No
Morristown	NJ	71	No
Teterboro	NJ	72	No
Lincoln Municipal	NB	73	No
Albuquerque Int'l	NB	74	No
El Monte	CA	75	No
Rochester Monroe County	NY	76	No
Norwood	MA	77	See text above
Melbourne	FL	78	No
Milwaukee Mitchell	WI	79	No
Atlanta DeKalb-Peachtree	GA	80	Claims immunity here

Judge Dyer lists seven cases for the proposition that there is such a restrictive federal rule (A.P.C.-28). None of the cases are from the United States Supreme Court. Moreover, we respectfully submit that they do not support him. In view of Judge Dyer's opinion having become the en banc *per curiam* opinion, we shall consider each:

West v. Morrison-Knudsen Company, 451 F. 2d 493 (9th Cir. 1971). This is *not* an application of "federal common law" but is a diversity jurisdiction opinion under the unusually restrictive law of the State of Montana. The case holds that an injured employee of a subcontractor is not entitled to sue as a third-party beneficiary of a safety provision in the prime contract between the United States and the general contractor. The Court expressly states at the top of page 494 that it so rules "*because under the law of Montana* such a beneficiary of safety clauses in a contract could not recover in the absence of a specific promise in the contract to pay damages." (Emphasis added.)

> "Appellants argue, however, that the contract provisions operate to change the basic rules of tort so that a duty by contract has been created, the breach of which creates a liability in tort for personal injury. They support their argument by the citation of cases from other jurisdictions which so hold. . . . *The problem is not the weight of authority wherever it may be, but the law of the State of Montana.*" (Emphasis added.)

Hensley v. United States, 279 F. Supp. 548 (D. Mont. 1968), is the next cited case by Judge Dyer. Here the United States had a contract with a construction company for building a dam. An employee of that corporation was injured when an inadequate rope broke. The contract between the company and the United States stated that the contractor shall be fully responsible for safety of the employees. The plaintiff,

the injured employee, it should be noted, was covered by the Montana Workmen's Compensation Act, and was being compensated under that statute. The plaintiff sought further compensation as third-party beneficiary of the contract between the United States and his employer. The District Court focused solely upon the *Montana* third-party beneficiary statute, Section 13-204, RCM, 1947, which reads as follows: 'A third-party may enforce a contract made expressly for his benefit." The Court notes that the Montana Supreme Court has ruled that the statute means the expression must be "in direct terms." Likewise, the Court notes that the Ninth Circuit, in *National Surety Co. of New York v. Ulman*, 68 F. 2d 330 (9th Cir. 1933), cert. denied 292 U.S. 624, "after an extensive review of the Montana authority concluded that a contract of the kind involved here is not enforceable by a third-party." If the case does stand for a rule that a contract must not only evidence an intent directly to benefit the third-party plaintiff but must also specifically evidence an intent to compensate him, then it is perfectly clear that the Court in *Hensley* is following *Montana* law, as was the court in *West v. Morrison-Knudsen*, and not federal law or a general rule of law.

Judge Dyer next cites *Brotherton v. Merritt-Chapman & Scott Corp.*, 213 F. 2d 477 (2d Cir. 1954). This was an opinion by Judge Frank, which says simply that this was a clear case where certain described contract language does not create third-party beneficiary status for the plaintiff. Of the six cases cited by Judge Frank in the opinion three of them are state court cases, although the question the case presents was a contract between the United States and a construction firm. Apparently Judge Frank did not consider state law cases irrelevant to determine who is a third-party beneficiary under a federal contract, but simply found that the particular contract provision in question was, as Judge Frank states at the beginning of the opinion, "intended solely for the government's benefit and not for the benefit of other contractors as

third-party beneficiaries. We think this is so clear that we can content ourselves with a mere citation of leading cases."

Next, Judge Dyer cites (at A.P.C.-29) *Johnson v. Redevelopment Board of the City of Oakland, California,* 317 F. 2d 872 (9th Cir. 1963). The case holds that persons affected by an urban renewal development project involving contracts between the United States and a California agency may not sue the California agency as third-party beneficiaries of those contracts, to enjoin the project. The Court holds that the contract "is governed by federal law" and "the federal courts have consistently held that those not party to the contracts have no standing to enforce conditions imposed on redevelopment agencies by the United States. . . ." (page 874). The case does use a federal rule to find plaintiffs not to have third-party beneficiary standing. That the rule of that case is clearly limited to contracts concerning urban development is shown by the balance of the opinion, which goes on to explain that, in this area of legislation, three alternative remedies to such a third-party beneficiary lawsuit are provided, none of which the plaintiffs there pursued. They are: (1) a grievance procedure before the federal housing administration; (2) federal and state requirements of public hearings, at which the plaintiffs did not appear; and (3) a California statutory provision for suit on the project in state court within 60 days of adoption. This also the plaintiffs failed to pursue.

Thus the case does not announce any general federal disinclination towards third-party beneficiary suits on federal contracts, and it goes to some pains to show that the result of disallowing third-party beneficiary status to those plaintiffs is not unfair, because of the several alternative remedies built into the statutory scheme. In fact the case indicates a proper willingness of federal courts, when considering possible third-party beneficiary claims against state agencies under federal contracts, to review the fairness and adequacy of available alternative rem-

edies, before foreclosing third-party beneficiary relief as a matter of federal contract interpretation.

Judge Dyer next cites *Mahler v. United States,* 306 F. 2d 713 (3d Cir. 1962). Here injured plaintiffs sued the United States because a boulder on a federal highway fell on plaintiff's automobile. The Court expressly looked first at state law (at page 722) to see if there was any "Pennsylvania rule of law which would impose liability on a private person under similar circumstances." The Court found no such state rule. It then looked to whether there was any basis for liability under the Federal Tort Claims Act. There it noted the existence of an exception from United States liability if the action by the United States was made "at a planning rather than operational level . . ." (page 723). The Court concludes that the United States' duties here were clearly "planning" rather than "operational" and affirmed judgment for the United States. The case really is of little relevance to our situation *vis a vis* County liability, but it should be noted that even here, where the question was the liability of the United States itself, the Court looked *both* to state law *and* to federal law to see if a basis for liability could be found under *either.* We submit that this is a proper analysis by the Third Circuit: the court looked both to state law and to federal law, and apparently would permit an action under either.

Housing Corporation of America v. The United States, 468 F. 2d 922 (U.S. Ct. Cl. 1972), next cited by Judge Dyer (A.P.C.-29), we respectfully submit, is almost totally inapplicable—it is a question of a third-party beneficiary suing the United States in an area where the United States has not waived its sovereignty.

Finally, Judge Dyer, in this series of citations, relies upon *Sayre v. United States,* 282 F. Supp. 175 (N.D. Ohio 1967). This, like the *Johnson v. Redevelopment Board* case cited by

Judge Dyer as supporting a restrictive federal rule of third-party beneficiary rights, is on its facts and by its express language an interpretation of an urban renewal venture between the United States and a local government. The case is brought by a property owner claiming to have been injured by the project, in that the use and value of his real property was damaged. The United States was dismissed as a defendant on its motion for summary judgment, under the "discretionary function" exception to the Tort Claims Act, and certain limited claims against the City of Cleveland were allowed to proceed. Specifically upon the third-party beneficiary issue, the Court holds at page 190 that: "The federal courts have consistently held that those not parties to the contract have no standing to enforce conditions imposed on *redevelopment agencies* . . ." (emphasis added).

Thus the seven cases cited by Judge Dyer in his panel dissent adopted as the *per curiam* opinion of the Fifth Circuit, as supportive of the use of a "federal common law rule," and specifically a restrictive rule along the lines of Restatement (First) of Contracts § 145 (1932), can be summed up as follows: Two (*Sayre*, and *Housing Corporation*) are expressly limited to contracts with redevelopment agencies, at the suit of persons claiming to be injured by urban renewal projects. In one (*Mahler*) the Court expressly looked both to state and federal law for a basis of liability. In another (*Brotherton*) the Court seems implicitly to look to both state and federal cases. In two (*West*, and *Hensley*) the Court specifically stated that it was following a restrictive Montana state rule.

The sum of all these cases seems to us to be a willingness of other federal courts to look both at possible available state remedies and at general rules of contract interpretation when dealing with contracts to which the United States is a party. We do not find in these cases any sweeping declaration that a special body of federal common law will be applied in such cases to deny standing to sue which would exist under state or general law.

Rather, the gist of the cases seems to be, and we respectfully submit that the rule ought to be, that in construing contracts to which the United States is a party a federal court is not strictly bound by *Erie* blindly to follow the rules of contract construction of the forum state, but will take into consideration state law, general law, and federal interests and policy; and in an appropriate case will apply, as a federal common law rule, a rule of interpretation which takes into account all these factors.

Application of that practice would, in our case, *Miree*, obviously result in review of the third-party beneficiary law of the forum state (which we submit would permit plaintiffs' action), plus review of the modern decisions from federal courts generally and review of the law generally as explicated by modern treatises and texts and would derive from all these a rule for the case, as we will attempt to do in Part 1-C of this brief. This, we submit, is the proper process of analysis for a federal district court today when the parties are before it with diversity and with asserted federal question jurisdiction, when construction of a federal contract is at issue, and when important federal policies (here aviation safety, and uniformity of interpretation of federal contracts) are involved.

To return to Judge Dyer's opinion, we note that it closes with a consideration of three aviation cases, which do not support his position. We shall consider each.

Port of New York Authority v. Eastern Airlines, Inc., 259 F. Supp. 745 (E.D. N.Y. 1966). The Port of New York Authority, which operates Laguardia Airport, brought an action for an injunction against several airlines to stop them from jet aircraft use of certain runways. The District Court found that the plaintiff was entitled to an injunction to enforce its regulations with respect to use of the runways.

United Airlines, one of the defendants, had claimed that the Port's regulation was contrary to the Port's agreements with the

FAA contained in grant agreements. The court held that there is nothing in the grant agreements abridging the right of the Port to enact such regulations, and that in any event the airline does not have standing as a third-party beneficiary to make such an assertion. As the court found that the grant agreement does not prohibit the Port's regulation, which was a noise abatement rule, the language concerning United's standing to assert the benefit of the grant agreement is of course purely dictum. Moreover, the court says "these agreements were not made expressly for the benefit of the airlines" (page 750). The case thus does not bear upon whether the *safety* provisions of the specific grant agreement in question in *our* case were intended to benefit the *public*. As noted elsewhere in this brief, the clear language in the grant agreement in our case recites that the Airport will be operated "for the use and benefit of the public." *Port of New York Authority* contains nothing, even in dicta, which cuts against our contention that members of the *public* (not commercial airlines) are express third-party beneficiaries of *safety* provisions of our grant agreement.

San Francisco v. Western Airlines, Inc., 22 Cal. Rptr. 216 (1962). This is a California state court intermediate appellate decision in a case brought by an airline with respect to discrimination in charges in rates paid by it. The airline focuses on the language in the contract which says that the Sponsor will operate the Airport "for the use and benefit of the public on fair and reasonable terms and without unjust discrimination." The Court holds that this language does not show any intent to confer a benefit upon the *air carriers* such as Western Airlines. The Court says: "To recover as third-party beneficiary, one must show that the contract in question was made expressly for his benefit." The Court cites for that proposition California Code § 1449 and relies on that particular state law governing third-party beneficiary rights in California. As in *Port of New York* this case is distinguishable in being brought by an airline and not a member of the public; and more importantly as being a

purely commercial complaint and not a matter pertaining to safety.

Eastern Airlines, Inc. v. Town of Islip, 229 N.Y.S. 2d 117 (1962). This was a decision of a state trial court sitting non-jury in an action brought by the airline against the City, in which the airline both sued in tort and claimed to be a third-party beneficiary of the grant agreement between the City and the United States. The plaintiff's aircraft was damaged when it ran off a runway into a snowbank. It was found that the airline was guilty of clear contributory negligence and that the airline's own negligence was the proximate cause of the accident. The court does embrace the Rule of Restatement of Contracts (First) § 145 (1932) with respect to additional counts where the airline seeks third-party beneficiary status.

Of Judge Dyer's three aviation cases one is a district court case, one is an intermediate state court appellate decision, and the third is of a state trial court sitting non-jury. Moreover, the holding of each of the three cases is that an *airline* is not an intended third-party beneficiary under a grant agreement.

Thus we respectfully suggest that Court of Appeals for the Fifth Circuit in our case failed to demonstrate the existence of any compelling "federal common law" rule which would deny to the plaintiffs that standing to sue which the law of Georgia gives them and which most judicial decisions generally, from federal courts and courts in other states, would also give them. There is no authoritative modern support for the rule of the Restatement (First) of Contracts § 145 (1932), and it ought not to be declared as the rule of federal common law.

C. The Federal Common Law Rule Permitting Third-Party Beneficiary Actions

As noted in Judge Morgan's dissent from en banc opinion (A.P.C.-3) there are at least two United States Court of Ap-

peals cases, including one from our circuit, supporting the view that federal common law should apply on the third-party beneficiary issue and would permit petitioners' action here. They are *Bossier Parrish School Board v. Lemon*, 370 F. 2d 847 (5th Cir. 1967); and *City of Inglewood v. City of Los Angeles*, 451 F. 2d 948 (9th Cir. 1972).

In *Bossier* the Fifth Circuit held that black children who were not allowed to attend a county (Louisiana parish) school system could sue as third-party beneficiaries under a contract between the United States and the school board. As Judge Morgan notes in his dissent here (A.P.C.-11), "Because *Bossier* was brought as a federal question suit, it is clear that the panel was applying federal common law when it held that the assurances given by the defendant in return for the United States grants made permissible a third-party beneficiary suit by plaintiffs." *Bossier* is compelling authority in the Fifth Circuit, directly in point, and was absolutely ignored by the majority opinion below. It is a federal question decision from that Court in an opinion by Judge Wisdom, in which Chief Justice Burger (then sitting as a circuit judge from the District of Columbia Circuit), along with Chief Judge Brown, joined. The Department of HEW had given money to the School Board in exchange for "assurances" that all children at a federal base would be duly admitted to the schools. The Fifth Circuit in *Bossier* adopted the language of the district court, which had held:

> "Defendants by their contractual assurances have afforded rights to these federal children as third-party beneficiaries concerning the availability of public schools" (page 850).

The Fifth Circuit there found these individual citizens to be third-party beneficiaries of a contract between the United States and a county agency, with standing to sue as such third-party beneficiaries, just as the panel majority opinion found in the instant case. This is an application of general, or federal com-

mon law principles. No restrictive interpretation in the nature of Restatement (First) of Contracts § 145 (1932) is suggested in the *Bossier* opinion because it is obvious that the United States sought those assurances, in its contract, for the direct benefit of the users of the facility, just as is clear in our case. It should be noted that Chief Judge Brown, who had joined in the *Bossier* opinion, joined in the dissent here, and dissented separately, as well, stating that federal law should control and that federal law "not only does not preclude the plaintiffs below from recovering as third-party beneficiaries but that federal law compels this result." (A.P.C.-14).

A similar case, and one involving an airport grant agreement, as here, is *City of Inglewood v. City of Los Angeles*, 451 F. 2d 948 (9th Cir. 1972) where another United States Court of Appeals adopted a similar standard, on facts which in many respects are closer than any cited case to the case at bar but yet not as strong as ours: property owners (individual plaintiffs, as well as the City of Inglewood) adjoining an airport were given standing to sue as intended beneficiaries under a Grant Agreement concerning the Los Angeles Airport, to complain of breaches of provisions in those agreements. The Ninth Circuit said:

> "It is not to Los Angeles' benefit to be required to give the Secretary those assurances; nor are the assurances of any independent benefit to the Secretary. The Secretary merely receives them for the benefit of, and in the place of, the surrounding communities and residents of the area. . . ."

City of Inglewood was a federal question case involving an airport grant agreement, just as in our case, and the Ninth Circuit held that the federal aviation acts *did* contemplate that the assurances required by the United States of the airport authority as part of the grant agreement *were* intended for the

benefit of the local residents and the users of the airports, both with respect to flight safety and welfare of persons living nearby the airport. The Ninth Circuit *allowed* the third-party beneficiary action. Its opinion is absolutely in conflict with that of the en banc majority here. How can the Court of Appeals, and the respondent here, possibly reconcile that holding with a contention that some sort of special restrictive rule applies to third-party beneficiaries when a governmental contract is involved? *City of Inglewood* was cited with approval, on the third-party beneficiary issue, in dictum, by the Seventh Circuit, in *Luedtke v. County of Milwaukee*, 521 F. 2d 387 (1975) at p. 391.

We submit that the Fifth Circuit's earlier opinion in *Bossier*, and the Ninth Circuit's opinion in *City of Inglewood* have clearly rejected any restrictive "Restatement (First) of Contracts, § 145" rule. Uniformity of decision is an important factor in the federal courts, particularly as they deal with federal contracts. Judge Dyer acknowledged just that in his panel dissent which the en banc Court of Appeals adopted *per curium* (at A.P.C.-27). Yet the present en banc opinion is diametrically opposite both to the Ninth Circuit and to the Fifth Circuit's own ruling in *Bossier*. In addition to uniformity, a goal here should be to promote what should be considered as a paramount goal of the federal aviation laws—safety. It is too clear to need arguing that liability for flagrant breach of safety provisions encourages safety, and that federalizing immunity from suit encourages lack of care.

Not only have the Fifth and Ninth Circuits, in *Bossier*, and *City of Inglewood*, and the leading treatise writer[2] rejected the old Restatement § 145 rule, but ten years ago the American

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[2] Williston, Contracts, 3d Ed. §374, at p. 945 states: "The opposite and growing view holds that a member of the public may avail himself of the provisions of the contract between the public body and the contractor, intended for the protection of the public, in an action against the contractor."

Law Institute itself recognized that modern needs and modern cases have rendered the old § 145 inappropriate. Tentative Draft No. 3 of the Restatement of the Law (Second), Contracts, dated April 18, 1967, withdraws the language of § 145 and replaces it with the following:

> §145. GOVERNMENT CONTRACTS
>
> (1) The rules stated in this Chapter apply to contracts with a government or governmental agency except to the extent that application would contravene the policy of the law authorizing the contract or prescribing remedies for its breach.
>
> (2) In particular, a promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless
>
> (a) the terms of the promise provide for such liability; or
>
> (b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.

The official comments to the proposed new rule begin with this statement: "Beneficiaries of government contracts have often been denied rights because of the doctrinal difficulties referred to in the Introductory Note to this Chapter. Subsection (1) reflects the disappearance of those difficulties, but leaves room for the weighing of considerations peculiar to particular situations."

Thus the new Restatement §145, at (1), would apply the general third-party beneficiary rules to contracts with governments and government agencies, and the special exception for

government contracts which Judge Dyer relied upon is withdrawn from the proposed new §145 entirely. Moreover, new subsection (2)(b) indicates specifically that in our case where the promisee [the United States—a defendant in our case] is itself subject to liability to the third-party beneficiary, and a direct action against the promisor [the County] is consistent with the terms of the contract and the policy of the law authorizing it, the action will be allowed. Subsection (2)(b) also makes it clear that such third-party rights include suit, as here, for *consequential damages*. (*Bossier* and *City of Inglewood* had not themselves involved claims for money damages). Of course in our case, as we have argued, an action is not only "consistent with" the policy of the federal aviation acts pursuant to which the contract was made, but ought to be compelled by the policies of those federal statutes. Moreover, the intent of the parties is made even more manifest by the County's purchase of liability insurance for this airport. In our first brief to the Court of Appeals panel we argued at pp. 21-24 that the Plaintiffs' First Amendment to Complaint (A. 53) should have been allowed. That amendment proposed to add as a defendant the County's insuror, which issued an "Aviation Insurance Policy" to the County with respect to its operation of the Airport. As pleaded, (A. 53) that insurance policy, purchased by the County, contained specific provision that "the company waives any right to deny liability under the policy or to refuse payment within the limits thereof by reason of the non-liability of the insured political subdivision for the wrongful or negligent acts of its agents and employees and its immunity from suit as an agency of the State performing governmental function." As that argument found no support among the panel we did not reargue it to the en banc Court of Appeals, or assign it specifically as a separate question presented here. However, we do respectfully ask the Court to note that the record here includes our motion to amend to add the County's insuror as a defendant, dated January 22, 1974 (A. 53). We offer the fact of the County's purchase of liability insurance (which policy contained the waiver of immu-

nity language quoted above) in support of our position that the clear intent of the grant agreement was to contract for the express benefit of "the public" (grant agreement, Part III, "Sponsor's Assurances, ¶2; A. 36) and "the aeronautical users of the Airport" (grant agreement, Part III, Sponsor's Assurances, ¶6; A. 36).

2. A County in Partnership With the United States in Operation of an Airport, Which Is a Federally Preempted Sphere of Interstate Commerce, Thereby Loses Its State-Law Immunity From Suit for Its Own Negligent and Wanton Misconduct.

The Commerce Clause constitutes a cession by the States to the federal government of jurisdiction to regulate interstate commerce. The Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. § 1301 *et seq.*, and The Airport and Airway Development Act of 1970, 84 Stat. 219, 49 U.S.C. § 1701 *et seq.* clearly establish that the federal government has preempted the field of aviation flight safety. There have been a number of cases in the federal courts where states, and state agencies, have claimed governmental immunity from suit although operating within some "federal sphere" under the Commerce Clause. The cases have included state operated railroads, interstate highway projects, harbor activities, and other areas of commerce where there is what is found to be a "paramount federal interest." The cases have found that the State, by engaging in such activities pursuant to federal statutes, will be deemed, as a matter of *federal* law, to have consented to suit. When the agency involved is a county, that result is most easily reached. Counties, such as the respondent here, do *not* have Eleventh Amendment protection, and may be sued in federal court. *Lincoln County v. Luning*, 133 U.S. 529 (1890); *Pettibone v. Cook County*, 129 F. 2d 850 (8th Cir. 1941). The immunity of the respondent county in our case is purely a doctrine of state law. Inas-

much as the Court has held that even states themselves, and entities which are alter egos of states, may lose their immunity, it seems even clearer that the immunity of a county, which does not have Eleventh Amendment protection, may be lost. It might be said that the chief anomaly of the majority opinion of the Court of Appeals here is that while the Court felt obliged to follow what it thought to be a *federal* common law rule of third-party beneficiary standing, it unhesitatingly applied a *Georgia* rule creating tort immunity for the respondent County.

Perhaps the leading case on loss of immunity by a state itself is *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184, reh. denied 377 U.S. 1010 (1964). The opinion was by Justice Brennan. He stated: "The question in this case is whether a State that owns and operates a railroad in interstate commerce may successfully plead sovereign immunity in a federal court suit brought against the railroad by its employee under the Federal Employers' Liability Act." He continues: "The Court has recognized that an unconsenting State is immune from federal-court suits brought by its own citizens as well as by citizens of another State. . . . But the immunity may of course be waived; the State's freedom from suit without its consent does not protect it from a suit to which it has consented." (377 U.S. at 186). The Court concludes that when Congress made the F.E.L.A. statute applicable to "every" railroad in interstate commerce, it meant just what it said. Against the defendant's argument that Congress did not have the power to abrogate immunity in this context, the Court held that the Statute was properly enacted in exercise of the United States' power to regulate interstate commerce. At 377 U.S. 191 the Court states: "The States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce." The Court continues: "By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." (377 U.S. at 192). Continuing, ". . . the question whether a State has waived its immunity is one of federal law . . . whenever the waiver is asserted to arise from an act done by the State within the realm of congressional regulation. . . . When a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation. . . ." (377 U.S. at 196).

A considerable body of law has built up since *Parden* applying and perhaps expanding its rule. In 1968 the Fourth Circuit in *Chesapeake Bay Bridge and Tunnel District v. Lauritzen*, 404 F. 2d 1001 considered the suit of a ship owner against a Virginia tunnel district for damages as result of negligence. The Court concluded that the tunnel district, although a political subdivision of the State, organized to perform an essential governmental function, could be sued in federal court. The Court concluded that the State's immunity was relinquished

> "by seeking and obtaining admission into an exclusive Federal realm—interstate and foreign commerce . . . necessarily, the State recognized that she built in the Bay only by sufferance of the Federal government. . . . To begin with, whether Virgina's entry into the Federal province amounts to consent to be sued, and to be sued in the United States court, is a question of Federal law. Hence, the decision of the State court upon the State's invulnerability to suit is not conclusive in resolving the relationship of the State and the plaintiff in a dispute arising in the Federal zone. . . ." (404 F. 2d at 1003).

The Fourth Circuit goes on to note that causes involving activities in the navigable waterways are to be adjudicated in admiralty, pursuant to 28 U.S.C. § 1333, and that the tunnel district could therefore be sued for a maritime tort in Federal Court. Section 1333 merely says that district courts have exclusive original jurisdiction of cases of admiralty.

In 1969, the Fifth Circuit, in *Centraal Stikstof Verkoopkantoor v. Alabama State Docks Department*, 415 F. 2d 452 (5th Cir. 1969), recognized the *Parden* rule but read it very narrowly. The action was by a Dutch plaintiff against the Alabama State Docks. The Fifth Circuit held that: "As long as the sovereign immunity claim does not prevent federal relief which would otherwise be attainable, we see no virtue in invoking federal jurisdiction. . . . The essential question is whether Docks as a warehouseman has entered into a federally regulated sphere in which a federal remedy is available." (415 F. 2d at 455). The Fifth Circuit considered the federal statutes involved, including the Shipping Act, the Interstate Commerce Act, and the Coast Guard Act, and found that there was no federal remedy under any of them. Therefore, it concluded that on the case presented there was no loss of sovereign immunity by reason of federal law. The Court went on, however to find that a claim *was* properly stated against the Dock's insurance company, a result also ironic in our case, where we were not permitted to join the County's insuror as a defendant, as noted earlier in this brief.

The development of the *Parden* rule continued, in 1970, when the Tenth Circuit issued an opinion in *Briggs v. Sagers*, 424 F. 2d 130. This was an action by employees of a state-owned institution pursuant to the Fair Labor Standards Act. The District Court had dismissed the case for want of jurisdiction. On appeal the State of Utah contended that the *Parden* rule was inapplicable because the operation of the State institution had commenced prior to the 1966 amendments to the Fair Labor Standards Act which had extended coverage to employees of hospitals, etc. Utah also argued that unlike the case in *Parden* the regulated activity in its case is "governmental in nature." The Tenth Circuit concluded that whether the activity be described as governmental or proprietary is irrelevant when the State is acting within an area delegated to the federal government. In such an area, the Court says, the federal government "may override countervailing state interests." (at p. 133). The

Court then considered the question of whether there is to be a distinction between continued participation in a sphere of activity commencing before enactment of federal legislation and entry into the field after federal legislation is enacted. The Court concluded: "The regulatory power of Congress, although limited to constitutionally defined matters, e.g., interstate commerce, is plenary as to those matters." The Court concludes that the Fair Labor Standards Act does apply to the State.

Also in 1970, the Third Circuit considered the "federal sphere" concept, in the case of *Red Star Tow. & Transp. Co. v. Department of Transp. of N. J.*, 423 F. 2d 104 (1970). There a barge owner sued a department of the state for damages for failure to operate a bridge properly in interstate commerce. Unlike the *Chesapeake Bay* case in the Fourth Circuit, supra, the Third Circuit finds on the facts that there was no loss of state immunity. The Court concedes that its ruling is contrary to *Chesapeake Bay* but holds that it will not find a loss of immunity unless Congress, in legislating in the field in question, created a new remedy to protect private persons.

But in 1971, in *Pennsylvania Environmental Council, Inc. v. Bartlett*, 454 F. 2d 613 (1971), the Third Circuit seems to have expressed intention to follow *Parden, Chesapeake Bay,* and *Briggs*. While affirming a district court which dismissed a complaint against the Pennsylvania Department of Highways for reasons irrelevant to our issue, the Court of Appeals took pains to comment at page 624 on the finding of the district court that the Department was immune from suit. The Court of Appeals said: "While the conclusions which we have reached on the merits render that holding more or less academic, we suggest that the district court opinion on this issue is at least questionable . . . A state may, by engaging in activities of paramount federal interest, waive its immunity under the eleventh amendment . . . Whether such a waiver has taken place is a question of federal law." (454 F. 2d at 624-25). At the conclusion of the

quoted language the Court cites the *Chesapeake Bay* case from the Fourth Circuit, which a year earlier it had rejected, and goes on to cite the opinion of the Fifth Circuit in *Named Individuals* (infra). The Court went on to say:

> "Much the same can be said about the sovereign immunity contention. It seems unlikely that having undertaken to apply for participation in the federal primary, secondary or interstate road systems a state can, if it decided the federal law is too onerous, attempt to withdraw and assert the defense that its actions are beyond challenge in a federal court. But we leave that issue for definitive determination in a later case, with the caveat here that our affirmance in this case is not to be construed as an approval of the district court's sovereign immunity holding." (454 F. 2d at 655).

Thus one would have to conclude that both the Third and Fourth Circuits have now adopted a broad construction of *Parden*. Also in 1971 the Fifth Circuit, having attempted to read *Parden* narrowly in *Centraal*, published its opinion in *Named Ind. Mem. of San Antonio Con. Soc. v. Texas Highway Dept.*, 446 F. 2d 1013 (1971), where rehearing and rehearing en banc were denied. Judge Thornberry wrote the opinion for a panel including Judges Morgan and Clark. The *Named Individuals* case challenged construction of a federal-aid expressway in San Antonio through a park area. The United States Department of Transportation and the Texas Highway Department made motions for summary judgment which the District Court granted. The Fifth Circuit reversed and remanded. The Court noted the existence of several recently enacted federal statutes dsigned to protect park lands from destruction by federal projects: § 4(f) of the Department of Transportation Act of 1966, 23 U.S.C.A. § 138 (Supp. 1971); § 138 of the Federal Aid to Highways Act of 1968, 49 U.S.C.A. § 1653(f) (supp. 1971); and § 102(2) of the National Environmental Policy Act of 1969. It is undisputed that the Secretary of Transportation did not comply with the

statutes. The procedural history of this complicated litigation, and some of the issues, are not relevant to our issue. Important to our case, however, is consideration of the argument made by Texas that it is free to ignore the federal statutes if it chooses to proceed to build the highway with its own funds. The Court of Appeals rejected that argument, saying:

> "We are not impressed with this argument. If we were to accept it, we would be giving approval to the circumvention of an Act of Congress. The North Expressway is now a federal project, and it has been a federal project since the Secretary of Transportation authorized federal participation in the project on August 13, 1970. As such, the North Expressway is subject to the laws of Congress, and the State as a partner in the construction of the project is bound by those laws." (page 1027).

At page 1028, the Court of Appeals continued:

> "No one forced the State to seek federal funding, to accept federal participation, or to commence construction of a federal aid highway. The State, by entering into this venture, voluntarily submitted itself to federal law. It entered with its eyes open, having more than adequate warning of the controversial nature of the project and of the applicable law."

Judge Clark dissented from the portion of the opinion quoted just above, and would have allowed Texas to continue in the construction of a state project, if Texas "makes a final disengagement from what appears to me more nearly a proposal than a marriage . . ." Petition for rehearing was denied and petition for rehearing en banc was denied.

If the relationship between Texas and the United States in respect to the San Antonio Freeway Project, upon which construction was just beginning, might at least to one member of the Court of Appeals for the Fifth Circuit be seen to be so

nearly unexecuted as to allow the State to extricate itself from the federal sphere, such surely is not true in our case, where we have a long-term relationship between the United States and DeKalb County with respect to funding and operation of the airport in question here.

In this connection it should be stressed that the United States, as a defendant in our case, having been sued under the Tort Claims Act, has cross-claimed against DeKalb County. The District Court apparently recognized that the County is not immune on those cross-claims, and did not dismiss them. Thus the County remains a defendant, and will, vis-a-vis the United States' claims, have to attempt to show that it was not negligent in operation of the airport. This leads to a strikingly anomalous result, if dismissal of petitioners' claims against the County is affirmed by this Court. The United States, which is sovereign in the field of interstate commerce, would be liable to suit, and its partner in the airport project, the County, which has no sovereignty in this federally-controlled area, would be immune vis-a-vis the petitioners, but apparently not immune on the cross-claims of the United States. Surely Congress in passing the civil aviation statutes which made this federal-county partnership possible should not be deemed to have intended that the United States, but not its local partner, would be liable to one injured in the course of using the project facility. And surely if there is loss of immunity on the United States' cross-claims for indemnity or contribution, it does not make sense to leave just enough vestige of immunity to bar the direct claims against the County.

In the Court of Appeals below, the respondent DeKalb County contended that the line of cases following *Parden* is no longer viable, at least in the Fifth Circuit, because of that Court's 1973 opinion in *Intracoastal Transportation Incorporated v. Decatur County, Georgia*, 482 F. 2d 361 (5th Cir. 1973). We concede that the Fifth Circuit's opinion in *Intracoastal* (and more to

the point, its refusal even to discuss the issue in opinion here) shows a reluctance to accept this Court's rule laid down in *Parden v. Terminal R. of Alabama Docks Dept., supra*, just as the Fifth Circuit's 1969 opinion in *Centraal* attempts to narrow *Parden* as much as possible. But in fact the Fifth Circuit (leaving aside its obligation to follow *Parden*) cannot point to its own *Intracoastal* opinion as grounds for refusing to deal with our "federal sphere of interstate commerce" argument, which we have made consistently throughout this litigation. For, as Judge Gewin, of the Fifth Circuit, noted in *Intracoastal*, at footnote 1 to that opinion, at 484 F. 2d at 362:

> "At the outset it should be noted that this appeal deals exclusively with the Georgia Department of Transportation, [which] is the alter ego of the State of Georgia . . . the propriety of the suit against Decatur County, Georgia, is not before this Court. See, *County of Lincoln v. Luning*, 133 U.S. 529, 530, 10 S Ct 363, 33 L. Ed 766 (1890)."

Judge Gewin thus makes the precise distinction made in our brief here, above, where we cite *County of Lincoln* for the rule that while the Eleventh Amendment grants immunity to the states, counties do not enjoy that protection under the Amendment. Thus the immunity discussed and preserved in *Intracoastal*, which Appellee DeKalb County says disposes of our contentions, was federal *constitutional* immunity, in no way involved here. The *Intracoastal* decision was closely drawn, and even as limited drew a dissent from Judge Wisdom. It is not persuasive on the issue presented here, of holding a county, while operating an airport as a proprietary function, liable for its wanton conduct and its breach of a contract with the United States which resulted in deaths of interstate passengers.

We submit that the rationale of *Parden* and the cases following it should apply, but with even greater vigor, on the issue of a county losing immunity which it only has by reason of state law, by choosing to enter into the business of operating an air-

port, and thus entering, in a proprietary capacity, the federally preempted sphere of interstate air commerce. It hardly seems reasonable that the parties intended the county to remain immune when its partner in the airport project here, the United States, had waived its immunity; and when (as discussed in this brief in Part 1-c) the county had purchased liability insurance with respect to its operation of this airport. In any event, only county funds and not state general revenues, are involved here. Thus the opinion of the Court by Justice Rehnquist in *Edelman v. Jordan*, 415 U.S. 651 (1974), is not inconsistent with the decision we urge here.

A Seventh Circuit case, *Kohr v. Allegheny Airlines, Inc.*, 504 F. 2d 400 (1974) *cert. denied*, 421 U.S. 978 (1975) is an important case bearing in part on the contentions of Part 1 of this Argument, that federal common law applies generally here. But we offer it specifically in connection with this Part 2 as authority for a federal court in an aviation case refusing to apply a particular substantive rule of the forum state because of the predominant federal interest.

An Allegheny DC9 collided in midair with a small plane owned by defendant Forth, and piloted by a student pilot, Carey, whose estate was also a defendant. The United States was a defendant pursuant to the Tort Claims Act (as in our case). The action was filed in diversity, and the district court for the Southern District of Indiana applied Indiana law on the issues of contribution and indemnity by Forth, Forth's parent corporation, and the Carey estate to Allegheny and to the United States. The district court found that Indiana law did not permit contribution or indemnity. The Court of appeals, noting in dictum that the district court seemed to be wrong in its construction of Indiana law in any event, held that a federal rule of contribution and indemnity should be imposed. We submit that a federal rule refusing to apply a state statutory immunity in our case ought

similarly to be imposed, on the principles explicated by the Seventh Circuit in *Kohr*, from which we quote at length:

> "The basis for imposing a federal law of contribution and indemnity is what we perceive to be the predominant, indeed almost exclusive, interest of the federal government in regulating the affairs of the nation's airways. Moreover, the imposition of a federal rule of contribution and indemnity serves a second purpose of eliminating inconsistency of result in similar collision occurrences as well as within the same occurrence due to the application of differing state laws on contribution and indemnity. Given the prevailing federal interest in uniform air law regulation, we deem it desirable that a federal rule of contribution and indemnity be applied."
>
> "That the federal interest in regulating airways is predominant was long ago recognized by Justice Jackson in Northwest Airlines v. Minnesota, 322 U.S. 292, 303, 64 S. Ct. 950, 956, 88 L. Ed. 1283 (1944):
>
> > 'Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23, to United States v. Appalachian Power Co., 311 U.S. 377 [61 S. Ct. 291, 85 L. Ed. 243]. Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.'
> >
> > 'Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the

(Still quoting from *Kohr*)

> hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and order. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.'

"With the passage of the Federal Aviation Act of 1958, 49 U.S.C. § 1301 et seq., Congress expressed the view that the control of aviation should rest exclusively in the hands of the federal government. In section 1108 of the Act, 49 U.S.C. § 1508(a), it is clearly provided that:

> '(a) The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. Aircraft of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.'

"The explicit objective of the Act is to foster the development of air commerce. 49 U.S.C. § 1346. To that end, it has been recognized that the principal purpose of the Act is to create one unified system of flight rules and to centralize in the Administrator of the Federal Aviation Administration the power to promulgate rules for the safe and efficient use of the country's airspace. United States

(Still quoting from *Kohr*)

> v. Christensen, 419 F. 2d 1401 (9th Cir. 1969); Air Line Pilots Association v. Quesada, 476 F. 2d 892 (2d Cir. 1960). When the notion of federal preemption over aviation is viewed in combination with the fact that this litigation ensues from a mid-air collision occurring in national airspace, that the Government is a party to the action pursuant to the Federal Tort Claims Act (28 U.S.C. § 1346(b) et seq.), and that this litigation has since its inception been subject to the supervision of the Judicial Panel created by the Multidistrict Litigation Act (28 U.S.C. § 1407 et seq.), there is no perceptible reason why federal law should not be applied to determine the rights and liabilities of the parties involved. The interest of the state wherein the fortuitous event of the collision occurred is slight as compared to the dominant federal interest. Accordingly, the rights and liabilities of Allegheny and the United States are peculiarly federal in nature and are to be governed by a federal rule of contribution and indemnity.[3]"

* * * * * * * *

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[3] In view of the aforementioned predominant federal interest in formulating a rule of contribution and indemnity we are of the view that the Federal Tort Claims Act is not an obstacle to the application of such a rule to the United States' claims. In addition we find no merit in defendents' argument that Allegheny and the United States are estopped to assert the invalidity of the dismissal of their cross-claims and third-party complaints.

Our case is not identical to *Kohr* —we do not have as many deaths; and the nexus of Georgia to the tranaction is admittedly greater than Indiana's was in *Kohr*. But on the other hand, we submit, a state law rule of immunity more deeply offends the purpose of the federal aviation regulatory system than state law rules concerning indemnity and contribution do. Immunity seriously undercuts the federal policies here, and a federal law rule denying immunity ought to be applied. Again we note, as stated before, that the County's immunity here is purely a state

law rule not protected by the Eleventh Amendment as might be the case if the State of Georgia itself was the defendant in question. As Mr. Justice Brennan said in closing his dissent in *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973), at 411 U.S. 323, "In short, the trend . . . has been against enforcement of governmental immunity except when clearly required by explicit textual prohibitions, as in the Eleventh Amendment. Moreover, as Parden illustrates, the trend also is to interpret those prohibitions narrowly and literally."

3. **An Implied Civil Remedy Exists Under the Federal Aviation Acts for Death or Injury Caused by Flagrant Breach of Federal Safety Standards.**

The District of Connecticut, in *Town of Easthaven v. Eastern Airlines, Inc.*, 282 F. Supp. 507 (1968) held that "it is clear that a violation of the provisions of the Federal Aviation Act or the regulations or rules issued pursuant thereto may give rise to a private federal right of action maintainable by those injured by the violation."

Then in 1972 a Federal District Court in California, in *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Calif. 1972) similarly found an implied private right of action under the federal aviation acts to create "a cause of action in favor of one who is injured or damaged by the death of a person resulting from such violation . . ." (350 F. Supp. at 615).

And recently in *In Re Paris Air Crash*, 399 F. Supp. 732 (C.D. Calif. 1975) that court again so held, setting forth at p. 748 the rationale in some detail:

> "Recently the Supreme Court set forth the factors which are relevant in determining whether a private remedy is implicit in a statute not expressly providing one. *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed 2d 26, decided June 17, 1975, sets them forth on page 78, 95 S. Ct. on page 2087 of the opinion:

(Still quoting from *In Re Paris*)

> "First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted . . .?' It is obvious from the discussion in the *Gabel* case that the overwhelming interest of the legislation is in safety. If the safety is not that of the passengers, then the Act has no meaning at all; and the first place to begin on safety is in the design and manufacture of aircraft."
>
> "Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? The legislative history shows the purpose of creating the Federal Aviation Administration was to avoid the division of responsibility which had arisen under previous legislation, to unify agencies for 'Air-Safety Legislation,' and to give the new administrator power to, among other things, '[m]ake and enforce safety regulations governing the design and operation of civil aircraft.' (italics added) Pub. L. 85-726, 1958 U.S. Code Cong. & Admin. News, p. 3741 *et seq.*"
>
> "Third, is it consistent with the underlying purposes of the legislative scheme to employ such a remedy for the plaintiff? This can also be answered affirmatively under the same discussion as for the previous question. As a general rule, when legislation provides a particular remedy or remedies, courts should not expand coverage to subsume other remedies, but even the most basic principles of statutory construction must yield to clear contrary evidence of legislative intent. *Passenger Corp. v. Passengers Assn.*, 414 U.S. 453, 458, 94 S. Ct. 690, 38 L. Ed. 2d 646 (1974). Clear intent on the part of Congress to provide against the improper design and manufacture of aircraft is found in the Federal Aviation Act, 49 U.S.C. § 1406, which says, *inter alia*: '[T]he provisions of this chapter are in addition to such remedies' of the states. Where conduct was torti-

(Still quoting from *In Re Paris*)

> ous, it was held that a private remedy would lie for persons on whose behalf a regulation was made. [citations omitted]"
>
> "Finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law? The converse, of course, is true since the federal regulation of aviation is so pervasive as to preempt state attempts at any such regulation. *City of Burbank v. Lockheed Air Terminal, Inc., supra.*"

We submit that *Town of Easthaven, Gabel,* and *In Re Paris Air Crash* should be adopted; and that a private action for personal injury or death as a result of violation of the safety provisions of the Aviation Act, or a grant agreement entered into pursuant thereto, should be recognized.

If the Court should find such a private action, the Fifth Circuit opinion in *Rogers v. Ray Gardner Flying Service, Inc.*, 435 F. 2d 1389 (5th Cir. 1970, reh. denied), cert. den. 401 U.S. 1010, which declined to find such an implied civil action, would be distinguished, as it was by the district court in *Gabel*, as a holding that there was no intent in the federal aviation statutes to override the state law of bailments and to create a wholly vicarious liability of a defendant who was without fault.

The recent opinion of the Third Circuit in *Rauch v. United Instruments Inc.* (12/30/75), 44 L.W. 2333 is also distinguishable and in fact that opinion takes pains to show clearly that it is not suggesting that such a remedy should not exist on the sort of facts we have here. *Rauch* itself was a weak case on the facts. Aircraft owners there sought to use a federal right of action to sue the manufacturer and distributors of altimeters which did not meet federal standards. The plaintiff aircraft owners had incurred money costs in connection with replacing the altimeters.

The Court of Appeals tested the Rauch claim for existence of a private remedy by the four tests established by this Court in *Cort v. Ash*, 422 U.S. 66 (1975). The Rauch claim was found to pass at least two of the tests of *Cort*, but to fail the second—that the plaintiffs be members of the class for whose special benefit the statute was enacted—and the fourth—whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a federal cause of action. *Rauch* fails the special benefit test because the actual class to be protected is those whose death or injury is caused by safety violations (such as the *Miree* petitioners). *Rauch* also fails the fourth test, according to the Third Circuit, because the traditional state remedies of breach of warranty of merchantability and fitness, and of negligence, and of strict liability for tort are all available to seek redress for costs incurred in replacing altimeters.

That the case at bar, *Miree*, passes the second *Cort* test—membership in the class to be protected—is clear beyond argument. *Miree* also passes that fourth test of *Cort v. Ash* which *Rauch* failed. The proof that an adequate traditional state law remedy is not available is that the claims made in the *Miree* complaint based on negligence, nuisance, strict liability, existence of insurance, and third-party rights under the FAA-DeKalb County grant agreement *were all denied* by the Fifth Circuit purporting to apply state law. The record of this lawsuit bespeaks more eloquently than argument that state law does not offer an adequate remedy for damages for death or injury of interstate passengers in civil aviation. The respondent DeKalb County argued in its Response to Petitioners for Certiorari here, at p. 10, that even if petitioners were to prevail on the third-party beneficiary issue, it would be a hollow victory, as our remedies would not exceed the rights of the contracting parties themselves, and would furnish no basis for the present actions. The issue is perhaps even more pointed in the *Miree* case than the other cases consolidated herewith, as the Miree children sue

through their guardians, and must show the existence of a remedy which survived the death of their father and mother; or a remedy which inheres directly in them. The argument made by Respondent, referred to above, proves that state law does not offer an adequate remedy to these petitioners.

We clearly meet all the *Cort* tests. Interstate civil aviation passengers (and their surviving children when their parents are killed) are clearly members of the class for whose special benefit the safety provision of the federal aviation laws and regulations, and the provisions of the grant agreement here, were drafted. The statutory reference is 49 U.S.C. § 1718:

* * * * * * *

> (3) The aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards.
>
> COMPATIBLE USE OF ADJACENT LAND
>
> (4) approriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and take-off of aircraft.

It was, of course, the operation of the County-owned open garbage dump next to the runway of the County-owned airport, which attracted the flock of birds which was a flight hazard known to the respondent County, and which caused this tragic crash. As to whether there is indication of legislative intent either to create or to deny a civil remedy, the excellent lengthy Note in 51 N.Y.U.L. Rev. 231 (May, 1976) mentioned in the *Miree* Petition for Certiorari at p. 20 considers the legislative indications on this issue in great detail (pp. 248-252) and found

an implied cause of action to be consistent with the legislative intent of the Federal Aviation Act (51 N.Y.U.L. Rev. at 252).

We have discussed *Cort's* fourth, first, and second test. The third is whether a civil remedy would be consistent with the statutory scheme. What has been said above, we submit, effectively answers this question as well. The main thrust of the statutory scheme is to create and encourage high standards of safety. The statute's requirement that runway hazards be mitigated (49 U.S.C. § 1718(3)), and that adjacent land not be used for a purpose incompatible with take-off and landing of aircraft (49 U.S.C. § 1718(4)) could hardly be better served than by imposing liability on an airport "Sponsor" which directly causes deaths by its flagrant, continued violations of those requirements, after repeated requests from the F.A.A. to mitigate the hazard, on adjacent land which the "Sponsor" County itself owned.

The author of the N.Y.U. Law Review note reached the conclusion that a federal cause of action ought to be recognized even without reference to, and apparently without special consideration of the extreme need for such a remedy when a culpable defendant asserts immunity under state law. The addition, in our case, of that factor, compels that the purpose of the federal regulatory system of interstate civil aviation be implemented by the recognition of a federal right of action to persons injured, and a wrongful death action to survivors of persons killed, as the direct result of violation of the federal laws and regulations governing aviation. With specific reference to the wrongful death action, we would ask the Court to find such an action here, as it did in ***Morange v. State Marine Lines, Inc.***, 398 U.S. 375 (1970), there not in aviation but under "general maritime law," in line with what the Court described as "the general rule of American law." 398 U.S. at 393.

In order to keep this brief within acceptable length, we adopt the above-mentioned N.Y.U. Note, "The Case for a federal

Common Law of Aircraft Disaster Litigation: A Judicial Solution to a National Problem," 51 N.Y.U.L. Rev. 231 (May, 1976), as it treats in detail the reasons which compel recognition of a federal remedy on the strong facts of the case at bar.

4. **A United States District Court, sitting in Diversity, Must Grant Standing to Sue to Parties Who Have Such Standing, as Contract Third-Party Beneficiaries, Under Applicable State Law.**

Doubtless in an ordinary diversity case the federal district court should apply the third-party beneficiary rule of the forum state. There are several factors which distinguish our case from such an ordinary case: (a) we also asserted federal question jurisdiction under the federal aviation acts; (b) the contract under which we sought to sue as intended third-party beneficiaries was a contract to which the United States was a party; (c) the United States is a defendant in the case, pursuant to the Tort Claims Act; (d) the contract was a federal airport grant agreement, treating an area of interstate commerce preempted by federal regulation; (e) petitioners' decedents were interstate air passengers; and (f) they were killed as the direct result of the flagrant violation, by the defendant County, of federal regulatory safety standards imposed upon that defendant by federal regulations specifically to avert this precise type of tragedy.

These six factors add up, we submit, to a powerful rationale for application of a federal rule of law to permit this action against the County. Parts 1, 2, and 3 of this brief argue three methods by which a federal rule can and should reach that result.

In this Part 4 we argue, alternatively, for the rationale of the majority opinion of January 30, 1976, of the panel of Court of Appeals, by Judge Morgan. (A.P.C.-16). He found that the substantive law of Georgia, where he had previously served as a United States District Judge, permitted petitioners' standing to

sue DeKalb County, in contract, notwithstanding the general state-law rule of county immunity. He found that Georgia courts recognize a contract exception, and specifically a third-party beneficiary exception, to the immunity rule and that petitioners could sue pursuant to that rule. At (A.P.C.-23) *et seq.* Judge Morgan's panel opinion shows in detail that if a Georgia statute authorizes a county to contract, an action for its breach is also created; and that under Georgia law (Ga. Code Ann. § 3-108) ". . . the beneficiary of a contract made between other parties for his benefit may maintain an action against the promissor on such contract." Then reviewing the facts alleged in the complaint, and the appropriate provisions in the grant agreement, Judge Morgan found it to be clear that the contract was intended for the benefit of the public, and that petitioners could sue the County, as a matter of state law.

Judge Dyer's dissent from the panel opinion (A.P.C.-27) contended that because of the strong federal interests involved, and the fact that the United States is a party to the contract in question, a federal common law test ought to apply on the issue of third-party beneficiary standing. He argued that federal common law, adopting the old rule of Restatement (First) of Contracts, § 145 (1932) permits third-party beneficiary actions only when the contract in question evidences not only a specific intent to benefit the plaintiff but also manifests a specific intent to compensate the plaintiff for injury in the event of its breach.

Judge Dyer found a sufficiently powerful federal interest here to warrant application of a federal common law rule of contract construction to defeat petitioners' *Erie* right to a state law third-party beneficiary remedy. Yet at the same time, he refused to consider that the federal interest justified a finding that the state law rule of immunity ought also to give way, or that the County waived its immunity by entering the federal sphere of interstate air commerce, or that a federal remedy for damages under the federal aviation acts ought to be permitted.

The Court of Appeals, after rehearing en banc, adopted *per curiam* this dissent of Judge Dyer's as the opinion of the Court. *In effect, the Court found just enough federal interest to justify depriving petitioners of their state law contract remedy, but not enough to give petitioners a federal remedy.* Eight members of the Court joined in that *per curiam* opinion. Five, including the Chief Judge, who also wrote separately, dissented, in an opinion by Judge Morgan.

Petitioners find the *per curiam* result to be cruel and ironic in its misapplication of principles of federalism. We have shown above in Part I of this brief that Judge Dyer is clearly wrong in finding federal common law on the third-party beneficiary issue to be so restrictive; we have shown that the cases he cites not only are not persuasive authority but that several of them simply do not stand for what Judge Dyer says they do (this brief, at Part 1-B). But leaving aside here the question of whether there is or is not a federal common law third-party beneficiary rule more restrictive than Georgia's, the frustration here comes from such a rule having been applied in the name of the "necessity for uniformity of decision" as Judge Dyer says (A.P.C.-27). How can uniformity of decision possibly be advanced by Judge Dyer's result, adopted *per curiam* by the en banc majority, which denies a remedy to survivors of persons killed at *this one airport*, which happened to be operated by a Georgia *county*, when concededly they could sue in tort if they had been killed at the Atlanta-Hartsfield airport, just a few miles away, where the FAA grant agreement was with a *municipality* rather than a county? And looking beyond Georgia, how does it promote uniformity to create a federal path to immunity for this one airport when the vast majority of airports throughout the nation, with which the FAA has grant agreements, have no immunity because of state law absence or abrogation of the doctrine with respect to the various municipalities, special authorities, and other jurisdictions and entities which have contracted with the FAA?[3]

[3] See material reported at footnote 1, *supra*.

And turning from the federal "necessity for uniformity of decision" which Judge Dyer claimed to have been promoting, what about the federal policy of promoting safety in air commerce? The Court below absolutely failed to advert to what the real overriding purpose of federal regulation of civil aviation is, *viz, safety in air commerce*. Once safety is recognized as the prime federal interest, as is hardly debatable, Judge Dyer's tortious rejection of state law in the name of federal interests, while he simultaneously constructs, on poor authority, a federal rule which denies a remedy for deaths caused by violations of federal safety standards, becomes patently circular reasoning. The federal interest is ill served by creating a shield of federal law to protect a county, operating an airport under a federal grant agreement, from liability for its own gross fault, when its own state law would not so shield it.

We submit that a proper result in this case, and perhaps the only proper result, would be to permit these diversity petitioners the use of whatever remedy they might have as a matter of state law (here, the third-party beneficiary remedy) *in addition* to such remedies as they may have as a result of application of federal law as argued in Parts 1, 2, and 3 of this brief.

There is a sub-issue of importance if the Court should determine that the state law rule on third-party beneficiary standing is the law to be applied. In such event we must ask the Court here, in order to achieve full relief, to adopt the finding of the majority panel opinion below that plaintiffs were as a matter of law, under their Complaint, and the grant agreement, *intended* beneficiaries of the contract. The reason we must ask this Court to consider this sub-issue is that in a footnote to his panel dissent, Judge Dyer noted his disagreement with that conclusion of the panel majority, and stated, in footnote (A.P.C.-27) that

> "Even if Georgia law should apply, the result would not be different. The majority recognizes that under Georgia law, only *intended*, and not *incidental* beneficiaries may recover

for breach of contract. As will be shown in this dissent, nothing in the grant agreements or the underlying statutes raises the status of the plaintiffs from incidental to intended beneficiaries."

Judge Dyer states (at A.P.C.-29) that the "broad assurances" made by the County are "nothing more than the assurances required by 49 U.S.C.A. § 1110." Whatever their genesis is, however, we submit that he is wrong in concluding that as a matter of law the petitioners are merely "incidental" beneficiaries, in view of the following language in the grant agreement, as pleaded in petitioners' Complaint: (A. 36)

> "1. These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal aid for the Project or any portion thereof made by the FAA and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed under this Project, but in any event not to exceed twenty (20) years from the date of said acceptance of an offer of Federal aid for the Project.
>
> 2. *The Sponsor will operate the Airport as such for the use and benefit of the public* . . . That Sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the Airport if such action is necessary for the *safe operation* of the airport or necessary *to serve the civil aviation needs of the public.*
>
> * * * * * * *
>
> 6. The Sponsor will operate and maintain in a *safe* and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the *aeronautical users* of the Airport other than facilities owned or controlled by the United States, and *will not permit any activity thereon which would interfere with its use for airport purposes* . . .

> 13. Insofar as it is within its power and to the extent reasonable, the *Sponsor will take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.*" (Emphasis added).

Notwithstanding this language, Judge Dyer's panel dissent concluded, as a matter of law, that petitioners' complaint was due to be dismissed, as they were clearly only "incidental" beneficiaries.

When the en banc Court of Appeals issued its opinion *per curiam*, it merely adopted Judge Dyer's dissent, and did not write separately; and in doing so it adopted (we believe inadvertently) this dictum to the effect that petitioners were in any event only "incidental" beneficiaries. The en banc dissent of five judges, written by Judge Morgan, states at its conclusion, (A.P.C.-13): "Under our interpretation of Georgia law, the law which we believe to be applicable here, plaintiffs could sue as third-party beneficiaries to the grant agreement between the United States and DeKalb County." We submit that Judge Morgan, the only member of the Court of Appeals who actually addressed himself to that issue, is clearly correct. Judge Dyer's opinion, adopted *per curiam* by the en banc Court of Appeals, seems clearly to concede that the Georgia rule is what Judge Morgan in his two opinions says it is. The dispute is rather whether the language in the grant agreement ("for the use and benefit of the public . . ."; ". . . safe operation . . . to serve the civil aviation needs of the public"; and ". . . to serve the aeronautical users of the Airport . . .") can possibly be said, as a matter of law, to make the petitioners, or their decedents, only incidental beneficiaries. Inasmuch as the appeal in this case was from a ruling of the district court granting one motion of the County to dismiss, we are entitled to a reversal unless as a matter of law that quoted language from the grant agreement

can be said not to intend the petitioners as beneficiaries of the contract.

Thus if the Court here should rule upon the issue raised by this Part 4, we ask that the Court hold that as a matter of law such language *does* give petitioners the status of intended beneficiaries; or alternatively to hold that petitioners are entitled to try this issue as a question of fact.

CLOSING STATEMENT

We submit that we have demonstrated how the Court of Appeals has picked and chosen pieces of state law and pieces of federal law to reach its result with no overall consideration either to policy and effect or to the fundamental issues implicit in the case.

Why is it that federal common law must apply to construe third-party rights under the contract here and thus deprive us of the one available state remedy, and at the same time a state law rule of tort immunity be given its full *Erie* force? Why was federal common law on third-party rights deemed to have been frozen at the date of the Restatement (First) of Contracts, (1932)? Why should the rights of interstate air passengers depend entirely upon whether they land at the Atlanta Municipal airport (which does not have immunity) or at this nearby airport, which claims to? Why should the County purchase insurance for airport liability and yet the dead or injured users of the airport get nothing, directly or indirectly, as a result of such insurance?

This case involves fundamental issues of federalism which have been applied below in a distorted and shortsighted manner to yield a harsh result. We have offered the Court here four rationales, each of which is consistent with basic principles and with the prior decisions of this Court and other courts, to permit an action for the deaths of petitioners' parents.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals below should be reversed, and the motion of respondent DeKalb County, Georgia to dismiss petitioners' complaint against it should be denied.

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Certificate of Service

I hereby certify that three copies of the foregoing Brief have this date been served by mail upon all parties represented in this proceeding this 28th day of February, 1977.

Alan W. Heldman

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

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DEKALB COUNTY, GEORGIA, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT DEKALB COUNTY

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DEKALB COUNTY, GEORGIA, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF RESPONDENT DEKALB COUNTY

STATEMENT OF THE CASE

A.

INITIAL OBSERVATIONS

Respondent, DEKALB COUNTY, GEORGIA (hereinafter "DeKalb County") files this Brief in response to four (4) Petitions for Writ of Certiorari and subsequently

filed briefs in four (4) separate actions styled as follows: *George Henson Miree, et al.* v. *DeKalb County* No. 76-607 (hereinafter "Miree'); *Judith Anita Phillips,* No. 76-659 (hereinafter "Phillips"); *Fireman's Fund Insurance Company* v. *DeKalb County,* No. 76-700 (hereinafter "Fireman's Fund"); and *William Michael Fields* v. *DeKalb County,* No. 76-722 (hereinafter "Fields").

This Brief will encompass the response of DeKalb County to each of the separately prepared and filed Petitions and subsequently prepared and supporting Briefs. Only a brief perusal of the written argument of the several Petitions will demonstrate a diversity of approach and emphasis on the extensive legal questions presented for this Court's review. Thus, DeKalb County is required, by the complexity and extent of the legal issues before this Court, to prepare a brief fully outlining all of the legal authority available for this Court's consideration.

DeKalb County is not unmindful of the desire of this Court as to the length of written briefs. But, with the limitless approach of the several Petitions coupled with DeKalb County's unawareness of those issues of interest to the Court, it is compelled to prepare an appropriate and somewhat lengthy, reply. However, for ease of reference, DeKalb County will departmentalize its brief by specific headings and arguments.

B.

PROCEEDINGS IN LOWER COURTS

The Petitions presently before this Court arise out of events which occurred on or about February 26, 1973. Each of the actions before this Court was instituted in the United States District Court for the North-

ern District of Georgia, Atlanta Division, against DeKalb County and the United States of America. Each of the initial complaints alleged diversity of citizenship jurisdiction, as it related to DeKalb County. Moreover, the initial complaints, in focusing upon Georgia Law for the creation of the causes of action and remedies, alleged that DeKalb County was liable to the present Petitioners under the legal theories of negligence, nuisance and breach of Federal Grant Agreements to which the Petitioners were alleged third-party intended beneficiaries.

DeKalb County, concurrently with the filing of responsive pleadings, filed Motions to Dismiss each of the present actions. The basis of said Motions was the immunity afforded DeKalb County by the Constitution and Laws of Georgia. The Honorable William C. O'Kelley, United States District Judge granted said Motions in unreported Order dated June 27, 1974 and September 24, 1974. In these unreported opinions, District Judge O'Kelley held that the application of Georgia Law to these diversity actions precluded the present actions under the theories propounded by the initial complaints.

The present Petitioners appealed the entry of judgment to the United States Court of Appeals for the Fifth Circuit. The initial panel comprised of Circuit Judges Godbold, Dyer and Morgan, held in *Miree* v. *United States,* 526 F.2d 679 (5th Cir. 1976), that DeKalb County was afforded immunity from the present actions under the theories of negligence and nuisance. However, that initial panel split over the issue of the rights of the Petitioners as third-party intended beneficiaries of the Federal Grant Agreements in issue. The majority of the initial panel, comprising Circuit

Judges Godbold and Morgan, asserted that Georgia Law applied to the determination of the rights and responsibilities of the Grant Agreements in issue, and that Georgia Law did not protect DeKalb County from suit under the circumstances. Circuit Judge Dyer dissented from the last assertion, pointing out that Federal Law should apply to the interpretation of the Grant Agreements, that Federal Law and the contracts in issue created no rights or remedies for the Petitioners, and that an application of Georgia Law would not change this result. DeKalb County promptly filed a vigorous Motion for Re-Hearing, asserting that under either Georgia or Federal Law, DeKalb County was not liable to the Petitioners herein. A re-hearing en banc was granted, limiting the issues to the third-party intended beneficiary theory, and in *Miree* v. *United States,* 538 F.2d 643 (5th Cir. 1976), the majority of the Court adopted the previous dissent of Circuit Judge Dyer. The result of this adoptive ruling was an affirmance of District Judge O'Kelley's orders and judgments, dismissing DeKalb County from the present actions.

DeKalb County desires to call this Court's attention to one other occurrence in the Lower Courts. The Miree brief, at p. 42, misleads this Court into believing that DeKalb County is still a party to the present actions in the Lower Court pursuant to cross-claims initiated by the United States. This is clearly incorrect as attached to this Brief, marked Exhibit "A", is a certified copy of an October 12, 1976 Order of District Judge O'Kelley specifically holding that DeKalb County is no longer a party below and not subject to requests for admission. The United States has chosen not to appeal the entry of judgment on behalf of DeKalb County and thus the cross-claims noted above are without present effect.

C.

STATEMENT OF FACTS

The Petitioners have taken diverse approaches to the presentation of a concise factual recitation, ranging from the exhausting narrative contained in the Fireman's Fund Petition and brief to the succinct account depicted in the Miree Petition. Needless to say, DeKalb County does take strong issue with many of the pleaded and conclusory "facts", asserted as true and contained within the various Petitions, particularly the additional "exhibits" attached to the Fireman's Fund brief, which were not part of the Joint Appendix. DeKalb County will not burden the Court or utilize further pagination, to bring the numerous conclusory allegations and unwarranted deductions of fact to the attention of this Court. DeKalb County finds the selective utilization of the "exhibits" contained within the Fireman's Fund brief, apparently beyond the Rules of this Court, to be a clear and unequivocal effort to prejudice this Court with matters beyond the appellate record, and without bearing on the multitude of legal, non-factual, issues before this Court. DeKalb County generally embraces as its factual statement, the factual account contained within the two (2) Orders entered by District Judge William C. O'Kelley, and the factual background set forth by Circuit Judge Morgan, in the initial panel opinion, reported at 526 F.2d 679, at 681.

However, DeKalb County does wish to inform this Court of certain factual aspects of these cases which have heretofore been omitted by Petitioners. First, DeKalb County must take strong issue with the continual suggestion of Petitioners that aviation is the *sole* issue before this Court. Even a brief review of

the diversity complaints in issue will demonstrate that DeKalb County is alleged to have been negligent, to have created a nuisance and to have breached the applicable agreements, by the County's operation of a *sanitary landfill* on County property adjacent to an airport, also resting on County property. Clearly, the central issue in this case is the operation of a *sanitary landfill*, which is obviously a local government function, lacking in any federal consequence except in terms of the environment, not involved herein. The inclusion of exhibits in the Fireman's Fund Brief on the Merits, which were not part of any record before any other Court in this matter, succinctly show that the precise subject matter of these actions is the *sanitary landfill*. In other words, DeKalb County is sought to be held responsible for its *ownership of land*, part of which was dedicated to the DeKalb-Peachtree Airport and on part of which was situated the sanitary landfill in issue.

The factum of the sanitary landfill, and its central focus herein, raise a second point of misconception, promoted by the Petitioners. The Petitioners belabor this Court with the implication that the County was operating all this land as a "business", for alleged "profit", contending that the shield of immunity is thus tarnished. The operation of a sanitary landfill on County property, utilized for the purposes of collection and disposal of waste from the County is, beyond question, a purely local governmental task, beyond any implied claim of waiver of immunity. The operation of the airport in issue, as a secondary aspect to this case, was at a substantial loss to the County in 1971 and 1972 (A-128, 129, 130).

ARGUMENT AND CITATION OF GEORGIA AUTHORITY

I.

INITIAL OBSERVATIONS

DeKalb County believes that certain relevant considerations to this Court's determination have been overlooked to date. The most pertinent of these matters, is the fact that the present actions were instituted in the United States District Court for the Northern District of Georgia, Atlanta Division, upon the basis of diversity of citizenship as it pertains to DeKalb County. (A-9, 107, 138, 257). Thus, the initial plaintiff's sought to invoke Georgia common and statutory Law theories of negligence, nuisance and breach of contract, as well as Georgia statutory remedies for wrongful death, personal injuries and property damage. The Petitioners herein looked to Georgia law to create a private cause of action and a private remedy. This, they were required to do, under *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) *and* for the more salient reasons that in the Federal Aviation enabling legislation, as well as the Federal Regulatory scheme, there are *no* private causes of action or civil remedies explicitly created, particularly in wrongful death actions. *Mounger* v. *Brandt,* 250 F. Supp. 445 (W.D. Wis. 1966); *Fernandez* v. *Linea Aeropostal Venezolana,* 156 F. Supp. 94 (S.D. N.Y. 1957); *Rosdail* v. *Western Aviation Company, Inc.,* 297 F. Supp. 681 (D. Colo. 1969); *Porter* v. *Southeastern Aviation, Inc.,* 191 F. Supp. 42 (M.D. Tenn. 1961); *Moody* v. *McDaniel,* 190 F. Supp. 24 (N.D. Miss. 1960); *Morrison* v. *Jack Richards Aircraft Company,* 328 F. Supp. 580 (W.D. Okla. 1971); *Rogers* v. *Ray Gardner Flying Service, Inc.,* 435 F.2d. 1389 (5th Cir. 1970);

McCord v. *Dixie Aviation Corp.*, 450 F.2d 1129 (10th Cir. 1971); *Polansky* v. *Transworld Airlines, Inc.* 523 F.2d 332 (3rd Cir. 1975); *Sanz* v. *Renton Aviation, Inc.*, 511 F.2d 1027 (9th Cir. 1975); *Yelinek* v. *Worley*, 284 F. Supp. 679 (E.D. Va. 1968). See also *Cort* v. *Ash* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed. 2d 26 (1975).

DeKalb County presents this initial observation because no argument is advanced which denied the existence of governmental immunity under Georgia Law. The arguments advanced by Petitioners seek to avoid or bar the application of the doctrine to the actions presently before this Court. Thus, the initial complaints were filed, seeking all the rights and remedies available under Georgia Law, while attempting to avoid the burdens flowing therefrom. DeKalb County contends that it would be incongruous for this Court to permit the application of Georgia private causes of action and remedies in Georgia Federal Court without recognition of the defenses available to this Respondent, particularly when the Petitioners have sought the application of Georgia Law for the creation of private rights and remedies.

With these initial observations, as to the application of Georgia Law, it is appropriate that this Brief turn its attention to a recounting of applicable Georgia authority.

II.

UNDER THE CONSTITUTION AND STATUTES OF GEORGIA, DEKALB COUNTY IS IMMUNE FROM SUIT IN THE PRESENT ACTIONS

In Georgia, the governmental immunity of a county has its basis *both* in statutory Law (Ga. Code Ann. § 23-1502) and in the Constitution of Georgia (Ga. Code

Ann. § 2-3710, Ga. Laws, 1973, p. 1489, ratified by electorate, 1974 General Election; Ga. Code Ann. § 2-8003).

The statutory basis of the immunity doctrine, as contained in Georgia Code Ann. § 23-1502, clearly and precisely provides as follows:

> "*A county is not liable to suit for any cause of action unless made so by statute.*"

The doctrine of immunity has received recent treatment and review by the Supreme Court of Georgia. Prior to the constitutionalization of the doctrine, the Supreme Court of Georgia in *Crowder* v. *Department of State Parks*, 228 Ga. 436, 185 S.E.2d 908 (1971), *cert. denied*, 406 U.S. 914, 92 S. Ct. 1768, 32 L.Ed.2d 113 (1972), held, as follows:

> "The plaintiff has requested that we review and overrule the full bench decisions of this Court set forth in Division 1 and others recognizing this doctrine of sovereign immunity.
>
> This request requires reference to some events preceding these decisions.
>
> The doctrine of sovereign immunity was imbedded in the Common Law of England at the time of the American Revolution.
>
> Georgia adopted this doctrine by virtue of its adoption of the Common Law of England by Act of General Assembly approved February 25, 1784. (Citations omitted).
>
> In this connection, this Court has held that the common law of force prior to May 14, 1776, was adopted as the law of this State by the act of February 25, 1784, except where modified by statutes or not adjusted to the conditions or system of government existing here. (Citations omitted). We

point out here that the doctrine of sovereign immunity has not been modified by statute.

It does not, we unhesitatingly hold, violate either the State or Federal Constitution.

This doctrine has continued in force in this State since 1784.

Whether it should now be abrogated is a matter of public policy which addresses itself to the Legislative, not the Judicial, branch of our State Government. . . .

We therefore hold that the complaint fails to set forth a claim for relief either in tort, contract or for nuisance.

Thereafter, the 1973 Session of the General Assembly of Georgia, approved an Amendment to the Georgia Constitution (Georgia Acts, 1973, p. 1489), which was ratified by the electorate in November, 1974. This Amendment, appearing as Ga. Code Ann. § 2-3710, establishes a State Court of Claims for resolution of matters against the State or its political subdivision, and expressly reserves the immunity rule for the protection of these governmental bodies. Shortly after the ratification of this Constitutional Amendment, the Supreme Court of Georgia was presented with another immunity attack for claims arising *before* the ratification of the Amendment. In *Sheley* v. *Board of Public Education*, 233 Ga. 487, 212 S.E. 2d 627 (1975), the Georgia Supreme Court held:

"We granted applications for Writs of Certiorari to the Court of Appeals in these two cases for the purpose of reassessing the rule of immunity of the State, its agencies, and subdivisions from liability for tort claims presented in our courts. Regardless of the merits or demerits of the immunity rule, it is conceded that it has existed throughout this State's history except in those situations where it has been eliminated by statutes enacted by the Georgia General Assembly. . . .

. . . we have again reviewed this issue in the context of these two cases and we conclude that, because of the Amendment to the Georgia Constitution proposed by the 1973 General Assembly and ratified by the electorate at the 1974 General Election, changes in the immunity rule, and the extent of such changes and in what circumstances, are now solely within the domain of the General Assembly of Georgia.

Because of the adoption of this Constitutional Amendment, and it is now effective as part of our Constitution, we hold that the immunity rule as it has heretofore existed in this State cannot be abrogated or modified by this Court. The immunity rule now has constitutional status and solutions to the inequitable problems that it has posed and continues to pose must now be effected by the General Assembly . . .

More recently, the Supreme Court of Georgia was presented with an action against Tift County, Georgia, for the alleged slip and fall of a visitor to the county courthouse. In *Revels* v. *Tift County,* 235 Ga. 333, 219 S.E. 2d 445 (1975), the Supreme Court of Georgia was faced with the assertion of governmental immunity and the contention that the doctrine violated applicable provisions of the Georgia and Federal Constitutions. The Georgia Supreme Court rejected the contention that the immunity rule violated either constitution and again affirmed the immunity rule.

As recently as February 9, 1977, the Georgia Supreme Court has again upheld and applied immunity in *Health Facilities Investments, Inc.* v. *Georgia Depart-*

ment of Human Resources, Case No. 31788, 238 Ga. —, — S.E. 2d — (1977), citing from the above-listed decisions and the constitutionalization of the immunity rule.

Clearly, the issues raised by any Due Process or Equal Protection arguments herein have been adjudicated adversely to Petitioners' positions by the Georgia Supreme Court. This Court has consistently upheld the doctrine of governmental immunity; *Palmer* v. *Ohio*, 248 U.S. 32, 39 S. Ct. 16, 63 L. Ed. 108 (1918); In Re: *State of New York*, 256 U.S. 490, 41 S. Ct. 588, 65 L. Ed. 1057 (1920), and has particularly viewed the issue as one calling for local determination. *Palmer* v. *Ohio, supra.* The highest court of Georgia has had ample opportunity to abrogate the doctrine of immunity, but has chosen rather to adhere to and strengthen the intent and application of the doctrine. Moreover, it is clear from the above-noted Georgia decisions that the Georgia Judiciary has thoroughly reviewed and weighed the countervailing factors of the immunity rule versus a system of government without immunity. The Georgia courts have chosen to protect the treasury and stability of government and have followed the course of immunity. With the constitutionalization of the immunity rule, at the behest of both the General Assembly of Georgia and the *people* of Georgia, the rule is simply beyond reproach by Georgia courts, and likewise courts construing or applying Georgia Law.

DeKalb County would thus show that even if a proper constitutional attack were lodged in this Court or the trial court, which DeKalb County denies is the case, the above-noted authority plainly supports the doctrine of immunity and its application to the facts presently before this Court.

III.

MUNICIPAL IMMUNITY IS NOT AN ISSUE BEFORE THIS COURT

Several of the Petitions and supporting Briefs make reference to a distinction in the immunity rule afforded to counties and municipalities in Georgia, suggestively alleging that such a refinement violates constitutional provisions. DeKalb County would submit that the recent constitutionalization of the immunity rule, outlined previously in this Brief, may have application to municipal immunity, as well.

However, DeKalb County does admit that the statutory basis for municipality immunity, contained in Georgia Code Ann. § 69-301, does contrast from statutory immunity afforded a county. The basis for the distinctive features and applications in these immunity rules was the subject of the Georgia Supreme Court's opinion in *Troup County Electric Membership Corporation* v. *Georgia Power Company*, 229 Ga. 348, 191 S.E. 2d 33 (1972), wherein that Court held:

> "Counties are subdivisions of the State Government to which the State parcels its duty of governing the people. (Citations omitted). They are local, legal, political subdivisions of the State, created out of its territory, and are arms of the State, created, organized, and existing for civil and political purposes, particularly for the purpose of administering locally the general powers and policies of the State. (Citations omitted) . . . On the other hand, municipalities are creatures of the Legislature, and their existence may be established, altered, amended, enlarged or diminished, or utterly abolished by the Legislature."

Circuit Judge Morgan, in the portion of the initial panel opinion which was adopted by the en banc Court

of Appeals, noted that this distinction "has long been recognized by the Georgia Courts," relying upon decisions such as *Ware County* v. *Cason*, 189 Ga. 78, 5 S.E. 2d 339 (1939), holding a county hospital immune from suit when city hospitals had no such immunity.

Thusly stated, counties were created as "arms of the State" at the local level. Counties must bear the State's burdens within their respective boundaries, while the municipalities, existing within the counties, as legislative creatures, can select from the various powers and duties available at the time of incorporation and reject those liabilities which will either be inapplicable for the particular location or *simply unwanted* by the incorporators who can rely upon the counties. Municipalities can come and go while counties must exist with and carry out the burdens and policies of the State. The distinctive liabilities of each are rational and imbedded in the law, applicable to each and every county in Georgia. Therefore, District Judge O'Kelley and the entire Fifth Circuit Court of Appeals were particularly correct in the determination and application of this distinction, and in the non-application of a multitude of municipality decisions cited by appellants therein and Petitioners herein.

IV.

THE ALLEGATIONS OF NUISANCE FAIL TO STATE A CLAIM UNDER GEORGIA LAW

One of the Petitioners' theories of recovery in the initial complaints was nuisance. As discussed earlier in Brief, the Petitioners' sought to apply a Georgia cause of action for nuisance for two (2) obvious reasons, i.e., the diversity nature of this action and the

lack of a private cause of action or remedy for nuisance in Federal Law. Thus, a review of Georgia authority on this point is appropriate.

It is a clearly established principal of Georgia Law that a county cannot be held liable for damages for a cause of action in nuisance as is presently asserted by the Petitioners herein. *Howard* v. *County of Bibb*, 127 Ga. 291, 56 S.E. 418 (1906); *Sheley* v. *Board of Education*, 132 Ga. App. 314, 208 S.E. 2d 126 (1974), *affirmed*, 233 Ga. 487, 212 S.E. 2d 627 (1975); *Williams* v. *Georgia Power Company*, 233 Ga. 517, 212 S.E. 2d 348 (1975).

DeKalb County would readily admit that authority exists for the maintenance of equitable actions or for actions under the taxing powers or actions for the unconstitutional taking or damaging of property for public purposes. The decisions of *Nalley* v. *Carroll County*, 135 Ga. 835, 70 S.E. 788 (1911) and *DeKalb County* v. *McFarland*, 223 Ga. 196, 154 S.E. 2d 203 (1967), primarily fall in the third category noted above, i.e., taking of property for public purposes, and this was recognized and applied by District Judge O'Kelley and Circuit Judge Morgan [in part two of the initial panel opinion, (526 F.2d 679) adopted by en banc Court of Appeals without dissent, (538 F.2d 643)]. The correctness of this approach is clearly seen from a review of the wrongful death action of *Williams* v. *Georgia Power Company, supra*, wherein the Georgia Supreme Court held:

> "The Appellants argue, however, that the County is liable in this case for the maintenance of a nuisance and relies on the cases of *Nalley* v. *Carroll County*, supra; *DeKalb County* v. *McFarland*, supra, and *Town of Fort Oglethrope* v.

Phillips, 224 Ga. 834, 165 S.E. 2d 141. There is no merit in this contention. The *Nalley* and *McFarland* cases involved nuisances which amounted to takings of property by the counties without paying the owners compensation. The *Phillips* case involved a municipality and not a county."

Moreover, even if a cause of action were available to the Petitioners herein, under a theory of nuisance, Georgia Law would not provide a remedy for wrongful death, personal injury, or for damage to personal property (the airplane) because, in Georgia, the rule appears to be well settled that the measure of damages for any injuries caused by a county's construction of public improvements and other projects is limited to actual depreciation and the market value of any real property affected by the improvements and projects. Thus, in *Howard* v. *County of Bibb, supra,* and *Austin* v. *Augusta Terminal Railroad Company*, 108 Ga. 671, 34 S.E. 852 (1899), the Supreme Court of Georgia held that in an action for the alleged creation and/or maintenance of a nuisance against the county, while damage to land itself was compensable on the theory of unjust taking without payment of adequate compensation, incidental damages flowing from the alleged nuisance were not.

Thus, a review of Georgia Law, sought to be applied by Petitioners herein, evidences that no cause of action or remedy is available to the Petitioners and the dismissal of this theory from the complaints was properly affirmed by the entire Fifth Circuit.

V.

DEKALB COUNTY IS NOT LIABLE IN NEGLIGENCE

The pleadings before this Court alleged that DeKalb County was negligent not in its operation of the DeKalb-Peachtree Airport, but in the County's operation of a sanitary landfill in close proximity to the Airport. Again, it must be noted that Georgia common and statutory Law, not Federal Law, is asserted as the alleged creator of a cause of action and a remedy. However, even a brief review of pertinent Georgia authority establishes that no cause of action or remedy is available against a county upon the theory of negligence. *Ware County* v. *Cason*, 189 Ga. 78, 5 S.E. 2d 339 (1939); *Bates* v. *Madison County*, 32 Ga. App. 370, 123 S.E. 158 (1924) (a county not liable for negligent performance of duty even when duty imposed by statute); *Revels* v *Tift County*, 235 Ga. 333, 219 S.E. 2d 445 (1975).

Specific attention is directed to the fairly recent decision of *Revels* v. *Tift County, supra.* In that case, the Supreme Court of Georgia was confronted with a civil action against Tift County for negligence in the slip and fall of the plaintiff in the county courthouse. The Georgia Supreme Court re-iterated that a negligence action against a county was simply unavailable to the plaintiffs therein, due to the county's unwaived immunity. The Court further disposed of the appellants' contention that immunity was violative of State and Federal Constitutions, by concluding that such a presentation was without merit.

The Petitioners herein have previously relied upon the airport decisions of *Caroway* v. *City of Atlanta*, 85 Ga. App. 792, 70 S.E. 2d 126 (1952); *Taylor* v. *King*,

104 Ga. App. 589, 122 S.E. 2d 265 (1961); *City of Macon* v. *Powell,* 133 Ga. App. 907, 213 S.E. 2d 62 (1975); and *Southern Airways* v. *DeKalb County,* 102 Ga. App. 850, 118 S.E. 2d 234 (1960). None of the above-noted decisions are from the Georgia Supreme Court and three (3) of the decisions involve municipalities, making them inapplicable for this Court's determination. The *Southern Airways* v. *DeKalb County, supra,* decision is factually distinguishable, in that the County leased the entire tract of land constituting the Camp Gordon Airport and a dispute arose over leasehold interest, and that Court simply declared the respective rights of the litigants. This interpretation of that line of alleged authority is consistent with the interpretations rendered by District Judge O'Kelley in the September 24, 1974 Orders, and by Circuit Judge Morgan in Part I of the panel opinion (526 F.2d 679), subsequently adopted, en banc, without dissent, (538 F.2d 643). Moreover, the adoption, by the Georgia General Assembly, of the Uniform Airports Law (UAL) codified as Ga. Code Ann. § 11-201, et seq., not only strengthens, but specifically provides for the immunity of DeKalb County, as follows:

> "Ga. Code Ann. § 11-202. Any lands acquired, or owned, leased, controlled, or occupied by such counties, municipalities, or other political subdivisions, for the purpose or purposes enumerated in § 11-201, shall and are hereby declared to be acquired, owned, leased, controlled, or occupied for public, governmental, and municipal purposes."

Additionally, the framework of UAL provides for civil enforcement by a "political subdivision or agency," (Code § 11-420) and criminal enforcement by the State (Code § 11-9902), but no mention of any private

causes of action or remedies, with Judicial review available only upon exhaustion of administrative remedies. (Code § 11-419).

Thus, the dismissal of the negligence theories contained within the complaints was properly affirmed by the entire Fifth Circuit.

VI.

PETITIONERS BREACH OF CONTRACT THEORY FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The Petitioners' theory of a third-party intended beneficiary of the Federal Grant Agreements received substantial and specific review by the Fifth Circuit. The initial panel, cited at 526 F.2d 679, split over this issue, with the majority, composed of Circuit Judges Morgan and Godbold, reviewing Georgia Law and finding that a claim was stated against DeKalb County. Circuit Judge Dyer dissented, 526 F.2d, at 686, suggesting that Federal Law applied and that even if Georgia Law applied, no claim would be stated. DeKalb County petitioned the Court for a re-hearing on this specific issue. The Court granted DeKalb County's Petition and presented counsel with this issue:

> "Whether DeKalb County can be held liable by Plaintiffs as third-party beneficiaries of the contract between Federal Aviation Administration and DeKalb County."

With this issue, the en banc court adopted the dissent of Circuit Judge Dyer. *Miree* v. *United States,* 538 F.2d 643 (5th Cir. 1976). DeKalb County urges that the position of Circuit Judge Dyer and a majority of the Fifth Circuit is correct, in that, under a review of either Georgia or Federal Law, DeKalb County is not liable.

A.

The Immunity of DeKalb County Is Available in the Present Actions

Previous portions of this Brief have fully informed this Court of the statutory (Ga. Code Ann. § 23-1502) and Constitutional (Ga. Code Ann. § 2-3710) basis of the immunity doctrine. As will be more fully expressed below, the immunity of the County reigns evident in the Petitioners' allegations of third-party intended beneficiaries status.

DeKalb County contends that its immunity from suit is clearly applicable to the facts at bar. *Purser* v. *Dodge County,* 188 Ga. 250, 3 S.E. 2d 574 (1939); *Lee* v. *Petty,* 133 Ga. App. 201, 210 S.E. 2d 383 (1974); and *Health Facilities Investments, Inc.* v. *Georgia Department of Human Resources,* Supreme Court No. 31788, February 9, 1977, 238 Ga. —, — S.E.2d. In *Purser* v. *Dodge County, supra,* the Georgia Supreme Court imposed county governmental immunity upon allegations of third-party beneficiary status. In *Lee* v. *Petty, supra,* the Georgia Court of Appeals found the third-party beneficiary claims "extremely doubtful" under the county immunity rule. In *Health Facilities Investments, Inc.* v. *Georgia Department of Human Resources,* the Georgia Supreme Court, had before it allegations that the Appellant therein had *contracted directly* with the State Department of Human Resources (DHR) during 1974 and 1975 to provide "skilled nursing facility services to State medical assistance (Medicaid) patients." A dispute arose over promulgation of certain maximum reimbursement ceilings, and the Appellants therein brought suit, seeking damages for breach and a declaration that the ceilings violated constitutional provisions. The Supreme Court of Georgia,

on February 7, 1977, held that the Complaint of Appellant therein was barred by the immunity of the State. The Georgia Supreme Court noted that the basis for the ruling was the constitutionalization of the Immunity Rule (Ga. Code Ann. § 2-3710) which has been discussed earlier in this Brief.

Clearly, the Immunity Rule now applies to breach of contract actions, even between contracting parties, much less, the strained theory of third-party intended beneficiaries to a contract. The effect of the recent constitutionalization of the Immunity Rule and its application by a Georgia Supreme Court in *Health Facilities Investments, Inc.* v. *Georgia Department of Human Resources, supra,* leaves questionable and suspect, though not specifically overruled, a line of prior authority involving permissible actions between a county and a *direct contracting party.* See *Deason* v. *DeKalb County,* 222 Ga. 63, 148 S.E. 2d 414 (1966), relying upon *Decatur County* v. *Praytor, Howton and Wood Contracting Company,* 163 Ga. 929, 137 S.E. 247 (1927). Those decisions have created the Judicial exception that a county can be sued by a contracting party, for a breach of any valid contract which it is authorized by law to make. Assuming, in arguendo, that this line of authority has present validity, Appellants below and Petitioners herein have placed substantial reliance upon this line of authority, urging that DeKalb County no longer has immunity from suit, as it was authorized by statute [Ga. Code Ann. § 11-201 (UAL)] to contract with the Federal Aviation Administration. There is no argument by Petitioners, nor can one be asserted, that the statutory authorization to contract, was itself, a waiver of immunity as the statute further provides that the contract shall be

for "governmental" purposes. Ga. Code Ann. § 11-202. Therefore, the waiver of immunity, if at all, comes not from the enabling statute, but from the act of contracting itself.

Thus, assuming the continued vitality of that line of authority, the issue is precisely drawn: Did the act of contracting by DeKalb County waive its immunity from suit, by those who are not parties to the execution of the contract? The Petitioners reliance upon *Decatur County* v. *Praytor, Howton and Wood Contracting Company, supra,* line of authority is misplaced as those decisions involved suits by *contracting parties not alleged third-party beneficiaries to the contract.* The only remaining decision sought to be applied is that of *Hancock County* v. *Williams,* 230 Ga. 723, 198 S.E. 2d 659 (1973). DeKalb County points out that the sequel to that decision is the more recent Georgia Supreme Court decision in *Williams* v. *Georgia Power,* 233 Ga. 517, 212 S.E. 2d 348 (1975), wherein the Court specifically limited the earlier decision, holding that Hancock County's *"only liability"* was to Georgia Power Company under an express indemnity contract and not to any alleged third-party beneficiaries. Certainly, this result, and inapplicability of the above-noted line of authority, even assuming its present vigor, cannot support the present claims of Petitioners as intended third-party beneficiaries under Georgia Law.

Thus, the inescapable conclusion is that DeKalb County is immune from suit under the Petitioners' theories of third-party intended beneficiaries to the Federal Grant Agreements in issue. This outcome is unaffected by an assertion that the County's immunity was waived by its contracting with a higher governmental authority, i.e., the Federal Aviation Administration. *Purser* v. *Dodge County, supra, Intracoastal Transportation, Inc.* v. *Decatur County, Georgia,* 482 F.2d 361 (5th Cir. 1973).

B.

Under Georgia Law, the Petitioners Are Not Third-Party Intended Beneficiaries of the Federal Grant Agreements

DeKalb County contends that prior to any determination of the status of the Petitioners herein, this Court must necessarily approach and determine the aforementioned immunity of the County. Assuming, in arguendo, that this Court reaches the issue of the status of the Petitioners herein, then this portion of this Brief will demonstrate that under Georgia Law, the Petitioners are merely incidental to the execution and performance of the Grant Agreements as well as incidental to the contracting governmental authority, i.e., DeKalb County, and as such, have not attained the status of third-party intended beneficiaries.

The initial panel majority opinion (526 F.2d 679), composed of Circuit Judges Morgan and Godbold, correctly held that under Georgia Law a stranger to a contract must be an *intended,* rather than an *incidental,* beneficiary of the contract in order to create or assert a cause of action for breach. 526 F.2d, at 685; Ga. Code Ann. § 3-108; *Steward* v. *Gainesville Glass Company,* 131 Ga. App. 747, 752, 206 S.E. 2d 857 (1974); *affirmed,* 233 Ga. 578, 212 S.E. 2d 377 (1975). With this basis, Circuit Judges Morgan and Godbold found the issue to be "whether the safety provisions in the contract between DeKalb County and the FAA were intended to benefit the public". 526 F.2d, at 685. This initial, two-member majority, found an affirmative response in a line of Georgia Court of Appeals decisions,

headed by the decision in *Smith* v. *Ledbetter Brothers, Inc.*, 111 Ga. App. 238, 141 S.E. 2d 322 (1965).

DeKalb County forcefully disagreed with this incorrect interpretation of Georgia Law and petitioned the remainder of the Court of Appeals for re-hearing on this specific issue. In its Petition, and in its subsequent Briefs, DeKalb County established that in each of the decisions constituting the *Smith* v. *Ledbetter Brothers, Inc., supra,* line of authority, the Georgia Court of Appeals did *not* have a *governmental contracting authority before it.* In each decision constituting that line of authority, *the parties sought to be held responsible was not a governmental authority with some form of immunity, nor was governmental immunity even involved.* Thus, that line of authority was inapplicable therein or herein where the governmental authority with immunity, i.e., DeKalb County, was sought to be held responsible.

DeKalb County presented for that Court's determination and for this Court's review, the decisions of *Purser* v. *Dodge County, supra, McWhirter Material Handling Company, Inc.* v. *Georgia Paper Stock Company,* 118 Ga. App. 582, 164 S.E. 2d 852 (1968); *Lee* v. *Petty,* 133 Ga. App. 201, 210 S.E. 2d 383 (1974); and more recently *Backus* v. *Chilivis,* 236 Ga. 500, 224 S.E. 2d 370 (1976). Without reciting the particular facts of the first three (3) decisions cited above, it is sufficient to suggest that the involvement of a county governmental authority, cloaked with immunity, was ample basis to deny the existence of the third-party intended beneficiary cause of action. More recently, the Georgia Supreme Court in *Backus* v. *Chilivis, supra,* had before it members of the public who as-

serted the status of third-party intended beneficiaries of a contract between the HL Yoh Company ("Yoh") and Glynn County, Georgia. The Appellants therein, as members of the public, sought to hold Yoh liable for breach of the contract, but the Georgia Supreme Court brushed that argument aside, holding:

> "In order for a third party to have standing to enforce a contract under Ga. Code Ann. § 3-108, it must clearly appear from the contract that it was intended for his benefit. The mere fact that he would benefit from performance of the agreement is not alone sufficient."

In support of the captioned holding, the Court cited *Stewart* v. *Gainesville Glass Company, supra,* and *McWhirter Material Handling Company, Inc.* v. *Georgia Paper Stock Company, Inc., supra.* Of even greater interest, is the suggestion by that Court, in referring to the *Smith* v. *Ledbetter Brothers, supra,* line of authority, that:

> *"Neither of the cases cited by Appellants support the proposition that a citizen can sue one which contracts with a governmental entity for breach of contract."*

Needless to say, the Georgia Supreme Court and Court of Appeals have had at least two (2) recent opportunities to apply the *Smith* v. *Ledbetter Brothers, supra,* line of authority (*Lee* v. *Petty, supra,*) to contracts involving counties and have refused to do so, finding no third-party beneficiary status. Clearly, there was no reason why the Fifth Circuit Court of Appeals and there is no reason why this Court should do otherwise, particularly when governmental immunity of the contracting party is added to the legal equation.

The above-cited authority is consistent with and applicable of the provisions of the Restatement of Contracts, Section 145, which provides, in part:

> "A promissor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all members of the public, is subject to no duty under the contract to such members to give compensation for injurious consequences of performing or attempting to perform it, or failing to do so unless,
>
> (a).
>
> An intention is manifested in the contract, as interpreted in light of the circumstances surrounding its formation, that the promissor shall compensate members of the public for such injurious consequences . . ."

For the application of this rule in Georgia, see: *Atlanta Gas Light Company* v. *Jennings,* 86 Ga. App. 868, 72 S.E. 2d 35 (1952) (citing *German Alliance Insurance Company* v. *Home Water Supply Company,* 226 U.S. 220, 33 S.Ct. 32, 57 L.Ed. 195 (1912)); *Fowler* v. *Athens City Water Works Company,* 83 Ga. 219, 9 S.E. 673 (1889); *Holloway* v. *Macon Gas Light and Water Company,* 132 Ga. 387, 64 S.E. 330 (1909). Any suggestion, in the Miree brief, that Georgia Law has a "liberal" approach concerning third parties, allegedly at odds with the Restatement Rule, is simply incorrect.

Lastly, DeKalb County asserts that Petitioners are both *incidental* to the contract *formation* and *incidental* to the contract *execution.* It is truly difficult to comprehend how members of the public could be otherwise. Even the suggestion that the class is narrowed to "aeronautical users" changes nothing from the mind-

boggling aspects of members of the public being third-party intended beneficiaries of broad assurances in government contracts. (Petition of Fields, No. 76-722, does not involve "aeronautical users"). As an example, could a "highway user" be a third-party intended beneficiary of an interstate highway construction contract between the United States and the State of Georgia or a political subdivision thereof? No, see *Daye* v. *Pennsylvania,* 483 F.2d 294 (3rd Cir. 1973). The mere fact that a member of the public would have benefited from performance *does not* create third-party intended beneficiary status under Georgia Law. *Stewart* v. *Gainesville Glass Company, supra; Backus* v. *Chilivis, supra.* DeKalb County also asserts that the Petitioners were equally *incidental* to the *contracting governmental party.* Under Georgia Law, it must appear that *both* parties to the contract intended to benefit a third person. *Stewart* v. *Gainesville Glass Company, supra.* None of the Appellants were residents of or taxpayers to DeKalb County. If DeKalb County executed and/or performed a contract for the *intended* not *incidental* benefit of strangers to the County, such an act by the County would be void and a nullity, as an unauthorized act beyond its jurisdiction, and immunity would obtain. See *Purser* v. *Dodge County, supra.* The intention to benefit a stranger would nullify the act of the County while the incidental recipient status would have the third party without a right or remedy against the County under Georgia Law. In either event, the County would not be liable and its dismissal would be proper.

C.

Under Georgia Law, the Petitioners Have No Greater Rights than the Contracting Parties Themselves

If this Court should determine that the governmental immunity of DeKalb County is inapplicable and that the Petitioners are third-party intended beneficiaries of the Federal Grant Agreements, then this Court must approach and determine the extent to which the Petitioners have a cause of action and a remedy for breach.

As discussed in the dissent registered by Judge Dyer, which was subsequently adopted as a majority view, a close review of the Grant Agreements in issue, will establish that the *only* rights accorded the contracting parties, i.e., the Federal Aviation Administration and DeKalb County, are the termination of funds flowing under the Agreements and possible enforcement of performance obligations imposed by the Agreements. See paragraph 2(a) 8(g) of Part I—Offer; paragraph 14 of Part III—Sponsors Assurances. Under common law and Georgia Law principles, the only rights accorded third persons would be those rights held by the contracting parties. As stated by the Court of Appeals of Georgia, in *Deal* v. *Chemical Construction Company,* 99 Ga. App. 413, 417, 108 S.E. 2d 746 (1959):

> "The rights of a third person to sue on a contract made for his benefit depend on the terms of the agreement and are no greater than those granted by the contract as intended by the parties thereto. To recover a beneficiary must bring himself within its terms and construction of the contract is involved. Since recovery on a third person beneficiary contract is a recovery on the contract itself, the right of the beneficiary is no greater than if the contract were enforced between the nominal parties, the beneficiary being in no greater position than the promisee."

Therefore, the rights accorded the parties to the Grant Agreements are simply not sufficient for the alleged third parties herein to maintain the present actions for wrongful death, personal injury and property damage.

VII.

DEKALB COUNTY HAS NOT WAIVED ITS GOVERNMENTAL IMMUNITY

DeKalb County refutes any suggestion that by the purchase of insurance, it has thereby waived its governmental immunity. Clearly, the involvement of an insurer in an action is sufficiently determinative of the outcome to follow State Law. *Nelms* v. *State Farm Mutual Insurance Company,* 463 F.2d 1190 (5th Cir. 1972). This is the only approach available when it is considered that the present actions are diversity actions and that no Federal Law exists on this issue.

In turning to Georgia Law, a brief perusal of the applicable authority will, unquestionably demonstrate, that the purchase of insurance by a county, neither waives the immunity of the county nor creates a direct action against the insurer. *Arnold* v. *Walton,* 205 Ga. 606, 54 S.E. 2d 424 (1949); *Revels* v. *Tift County,* 235 Ga. 333, 335, 219 S.E. 2d 445 (1975). This result was reached by District Judge O'Kelley and affirmed, without the dissent, by the en banc Court of Appeals.

Lastly, DeKalb County asserts that any hint that an implied waiver of immunity has occurred due to the operation of the airport adjacent to the governmental

sanitary landfill must fail in light of § 3-25 of the DeKalb County Code (Airport Rules and Regulations) which provides, as follows:

> "The County assumes no responsibility for loss, injury or damage to persons or property by reasons of fire, water, theft, vandalism, wind, flood, earthquake or collision damage, nor does it assume any liability for injury to persons while on the airport, while using the facilities, or for property damage."

SUMMARY OF ARGUMENT AND CITATION OF GEORGIA AUTHORITY

Under Georgia Law, which is applicable to the present diversity Petitioners, DeKalb County is not liable due to its unwaived immunity. Thus, a review of Georgia Law requires an affirmance of District Judge O'Kelley and the Fifth Circuit Court of Appeals.

ARGUMENT AND CITATION OF FEDERAL AUTHORITY

I.

INITIAL OBSERVATIONS

Initially, DeKalb County must again reiterate that the complaint filed on behalf of Petitioners' herein grounded the jurisdiction of the lower court, upon diversity of citizenship, as it pertained to this Respondent. (A-9, 107, 138, 257). No Federal question was presented in the original complaints, nor do the Petitioners herein suggest the existence of explicit Federal causes of action or Federal remedies for wrongful death, personal injury and property damage. On the contrary, the Complainants sought to invoke Georgia statutory and common law causes of action

for negligence, nuisance and breach of contract, as well as Georgia remedies for wrongful death, personal injury and property damage. DeKalb County raises these aspects of interest because of the Appellate level assertion by Petitioners' herein that this Court should effectively fashion a Federal cause of action and a Federal remedy.

DeKalb County has consistently urged that under either Georgia or Federal Law, it is not liable to Petitioners herein. DeKalb County has preferred the application of Georgia Law, not out of any fear of the suitability of Federal Law to its posture in the present matters, but out of a dutiful respect to the law which is both the creator and protector of it. DeKalb County admits that Federal interests are involved in the disbursement of Federal funds by Federal Grant Agreements, but this is apparently the only interest of Federal Law to the facts at bar. Of course, Petitioners have sounded the alarm of aviation and the supposed application of the Interstate Commerce Clause, but a true reading of the facts before this Court, evidence a matter of purely local involvement and interest, i.e., garbage collection and disposal. Notwithstanding this lack of Federal involvement, DeKalb County will endeavor to detail, for this Court, the profusion of Federal Authority supportive of its position, even under the facts as alleged by Petitioners.

II.

THE IMMUNITY OF DEKALB COUNTY REIGNS EVIDENT IN FEDERAL LAW

A.

The Immunity Afforded DeKalb County Under the Constitution and Statutes of Georgia Is Applicable in Federal Law

The present actions, as they pertain to DeKalb County, have their respective groundwork in diversity of citizenship. Thus, a review of appropriate Georgia authority is mandated. *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). DeKalb County, in the previous portions of this Brief, has fully apprised this Court of the immunity afforded DeKalb County, by both the Constitution and Statutes of Georgia.

DeKalb County calls this Court's attention to the fact that three (3) Circuit Courts of Appeals have held the immunity doctrine unimpaired by entry into some sphere of alleged Federal preeminence. *Rogers* v. *Ray Gardner Flying Service, Inc.*, 435 F.2d 1389 (5th Cir. 1970); *Intracoastal Transportation, Inc.* v. *Decatur County, Georgia*, 482 F.2d 361 (5th Cir. 1973); *Red Star Towing and Transportation Company* v. *Department of Transportation of the State of New Jersey*, 423 F.2d 104 (3rd Cir. 1970); and more recently, *Williamson Towing Company, Inc.* v. *Illinois,* 534 F.2d 758 (7th Cir. 1976). In *Rogers* v. *Ray Gardner Flying Service, Inc., supra*, the 5th Circuit Court of Appeals had before it a wrongful death aviation action. Among several holdings relevant herein, the Court, speaking through Circuit Judges Godbold, Simpson and Morgan, held that State sovereignty was unimpaired in the area of aviation. Later, the Fifth Circuit in *Intracoastal Transportation* v. *Decatur County,*

Georgia, supra, with both the State of Georgia and Decatur County, Georgia before it, held that entry into admiralty areas did not subject the defendants to Federal "overlordship". Similar admiralty actions were dismissed due to the effect of immunity in *Red Star Towing and Transportation Company* v. *Department of Transportation of the State of New Jersey, supra,* and *Williamson Towing Company, Inc.* v. *Illinois, supra.*

The reasoning of the above-noted decisions clearly has its cornerstone in the federalism doctrine upon which the Union was created. Though the doctrine of federalism has received less than polite treatment in recent years, it was recently reviewed and re-affirmed, and appropriately applied, in this Court's recent decision in *National League of Cities* v. *Usery,* ——U.S. ——96 S. Ct. ——, 49 L. Ed. 2d 245 (1976). See also *Oregon* v. *Corvallis Sand and Gravel Company,* —— U.S. —— 97 S. Ct. ——, 50 L. Ed. 2d 550 (1977).

Thus, the implied entry of DeKalb County into a Federal sphere of influence in garbage maintenance and/or aviation, does not erase the unwaived immunity of the Respondent. As will be discussed, *infra,* the decision of *Parden* v. *Terminal Railway,* 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964), does not affect this result.

B.

The Eleventh Amendment Applies Herein To Afford DeKalb County Immunity

The Eleventh Amendment to the United States Constitution provides as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of

> the United States by citizens of another State or by citizens or subjects of any Foreign State."

The Miree Petitioners, as residents of Alabama, the Phillips Petitioner, as a resident of Tennessee, the Fireman's Fund Petitioner, as a resident of California, and the Fields Petitioner as a resident of North Carolina, all satisfy the "citizens of another State", prerequisite of the Eleventh Amendment. The only other requirement of the Amendment is that the party sought to be held responsible is the State. Admittedly, the State of Georiga has not been made a party to any of the present claims. DeKalb County has previously suggested the impropriety of the Petitioners' failing to name the State, particularly as it related to the alleged unconstitutionality of the Georgia Immunity Doctrine. Moreover, DeKalb County admits that this Court, in a particular set of circumstances and facts, has held that the Eleventh Amendment does not flow to a county, in the older decision in *Lincoln County* v. *Luning,* 133 U.S. 529, 10 S. Ct. 363, 33 L. Ed. 766 (1890). However, DeKalb County contends that the second requirement of the Eleventh Amendment, i.e., that a state be involved, is discharged when this Court reviews the substantial exposure of the County.

The Miree Petitioners seek $5,500,000.00 in damages for two (2) deaths, the Phillips Petitioner seeks $1,000,000.00 for one (1) death, Fireman's Fund Petitioner seeks over one half million dollars for an assigned hull loss claim, and the Fields Petitioner seeks over $3,000,000.00 for serious personal injuries sustained while being sprayed with flaming aviation fuel. From its place, DeKalb County can inform this Court that the total monetary damages sought by claimants in all of the suits pending in the lower courts,

including those pending in the State Courts, exceed *$37,000,000.00*. From its place, DeKalb County can further inform this Court that its total leviable and attachable budget for fiscal year 1976 is approximately $44,000,000.00. Even the application of minimal insurance coverage, which would be directly at odds with Georgia Supreme Court decisions in *Arnold* v. *Walton,* 205 Ga. 606, 54 S.E. 2d 424 (1949); *Revels* v. *Tift County,* 235 Ga. 333, 219 S.E. 2d 445 (1975), would only provide a maximum coverage of $100,000.00 per person. (A-232). Petitioners herein and the parties in interest below, are quite obviously not satisfied with those minimal coverages and will obviously seek to pursue DeKalb County for any excess exposure, which could be as much as $35,000,000.00.

Needless to say, DeKalb County lacks the resources to satisfy such judgments as these, or even judgments as sought only by the present Petitioners. Of necessity, the State of Georgia, by and through its General Assembly, could be called upon by Petitioners herein and parties in interest below, to satisfy the judgments against DeKalb County out of the State Treasury.

This Court, in the fairly recent case of *Edelman* v. *Jordan,* 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), held as follows:

> " . . . it is also well established that even though a state is not named a party to the action, a suit may nonetheless be barred by the Eleventh Amendment. In *Ford Motor Company* v. *Department of Treasury,* 323 U.S. 459, 89 L. Ed. 389, 65 S. Ct. 347 (1945), the Court said:
>
> 'when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled

> to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' Id. at 464, 89 L. Ed. 389.
>
> Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the State Treasury is barred by the Eleventh Amendment. *Great Northern Life Insurance Company* v. *Reid,* supra; *Kennecott Copper Corporation* v. *State Tax Commissioner,* 327 U.S. 573, 90 L. Ed. 862, 66 S. Ct. 745 (1946)."

See also, *Harris* v. *Tooele County School District,* 471 F.2d 218 (10th Cir. 1973).

Certainly, the above-noted language is precisely applicable to the facts at bar, requiring the intervention of a Federal immunity concept along with the previously discussed State Immunity Rule.

C.

There Has Been No Waiver of the Immunity Afforded DeKalb County

Previous portions of this Brief have dealt with the assertion that DeKalb County waived the immunity afforded it by Georgia Law. A meticulous review of Georgia Law found that assertion to be lacking.

A similar waiver argument is presented by Petitioners herein in the area of Federal Law, with the assertion that DeKalb County has entered into a Federal sphere of influence. DeKalb County is somewhat perplexed with the argument that garbage collection and disposal enters a Federal sphere of influence, but assuming, en arguendo, that it does, Petitioners place almost sole reliance upon this Court's decision in *Parden* v. *Terminal Railway,* 377 U.S. 184, 84 S. Ct.

1207, 12 L. Ed. 2d 233 (1964). However, this argument fails to take cognizance of this Court's more recent decisions in *Employees* v. *Missouri,* 411 U.S. 279, 93 S. Ct. 1614, 36 L. Ed. 2d 251 (1973); and *Edelman* v. *Jordan,* 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). Clearly, *Parden* v. *Terminal Railway, supra,* was an F.E.L.A. action with a Congressionally enacted and created Federal cause of action, Federal forum and Federal remedies. From this foundation, a divided Court found a "waiver" of immunity granted a subdivision of the State of Alabama, by its entry into a Federal sphere of influence. As will be discussed more fully in a subsequent portion of this Brief, there is no Congressionally enacted or created Federal cause of action, Federal forum or Federal remedy presently before this Court. A Congressional intention to subject the states and their subdivisions to a waiver of immunity is also completely lacking.

A case with a similar posture was before this Court in *Edelman* v. *Jordan, supra,* where this Court, through Justice Rehnquist, held:

> ". . . we do not think that the answer to the waiver question turns on the distinction between *Parden,* supra, and *Employees,* supra. Both *Parden* and *Employees* involved a Congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included states or state instrumentalities. Similarly, *Petty* v. *Tennessee-Missouri Bridge Commission,* supra, involved Congressional approval, pursuant to the Compact Clause of a compact between Tennessee and Missouri, which provided that each compacting State would have the power "to contract, to sue, and be sued in its own name." The question of waiver or consent under the Eleventh Amendment was

found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.

But in this case the threshold fact of Congressional authorization to sue a class of defendants which literally includes states is wholly absent. Thus Respondent is not only precluded from relying on this Court's holdings in *Employees,* but on this Court's holdings in *Parden* and *Petty* as well."

Clearly, the *Edelman* v. *Jordan, supra,* approach is applicable to the present case and no waiver of immunity should be found.

One other reason exists for the inapplicability of the *Parden* v. *Terminal Railway, supra,* approach to the present actions. Counsel for DeKalb County has researched every Federal decision citing *Parden* v. *Terminal Railway, supra.* Apparently, no Federal Court, in an *aviation* case, has relied upon the *Parden* v. *Terminal Railway, supra,* approach. Even if this Court should adopt the suggestion of Petitioners that the present actions are, in reality, aviation actions, the *Parden* v. *Terminal Railway, supra,* decision provides no authority or support for their respective positions. Moreover, the previously discussed decision in *Rogers* v. *Ray Gardner Flying Service, Inc.,* 435 F.2d 1389 (5th Cir. 1970), does provide an aviation law answer in the negative to the waiver question.

Therefore, a waiver of DeKalb County's immunity has not occurred, and the County is not properly sued.

III.

NO PRIVATE CAUSE OF ACTION OR PRIVATE REMEDY IS AVAILABLE TO PETITIONERS UNDER FEDERAL LAW

It is uncontested that the Federal Legislative and Regulatory scheme surrounding aviation does not explicitly create either a Federal cause of action or a Federal remedy for the Petitioners herein. Thus, the only means by which the present Petitioners can maintain actions based upon Federal Law is for this Court to imply not only a civil cause of action, but a civil remedy, along with the necessary adoption of a Federal forum.

DeKalb County would direct this Court's attention to the fact that numerous Federal Courts have reviewed this specific issue, particularly in some cases involving aviation mishaps causing personal injury and death. *Rogers* v. *Ray Gardner Flying Service, Inc.,* 435 F.2d 1389 (5th Cir. 1970); *McCord* v. *Dixie Aviation Corporation,* 450 F.2d 1129 (10th Cir. 1971); *Polansky* v. *Transworld Airlines, Inc.,* 523 F.2d 332 (3rd Cir. 1975); *Sanz* v. *Renton Aviation, Inc.,* 511 F.2d 1027 (9th Cir. 1975); *Moungey* v. *Brandt,* 250 F. Supp. 445 (W.D. Wis. 1966); *Yelinek* v. *Worley,* 284 F. Supp. 679 (E.D. Va. 1968); *Porter* v. *Southeastern Aviation, Inc.,* 191 F. Supp. 42 (M.D. Tenn. 1961); *Moody* v. *McDaniel,* 190 F. Supp. 24 (N.D. Miss. 1960); *Morrison* v. *Jack Richards Aircraft Company,* 328 F. Supp. 580 (W.D. Okla. 1971); *Rosdail* v. *Western Aviation Company, Inc.,* 297 F. Supp. 681 (D. Colo. 1969); *Fernandez* v. *Linea Aeropostal Venezolana,* 156 F. Supp. 94 (S.D. N.Y. 1957); *Morzingo* v. *Consolidated Construction Company,* 171 F. Supp. 396 (E.D. Va. 1959). *Wolf* v. *Transworld Airlines, Inc.,* 544 F.2d 134 (3rd Cir. 1976);

Rauch v. *United Instruments,* 3rd Cir. (12-30-76, Case No. 76-1184). Each of these decisions stand for the proposition that Federal Courts will not create either a Federal cause of action or a Federal remedy out of the silent legislation and regulatory scheme surrounding aviation. Clearly, these decisions are appropriate precedent for this Court's present determinations.

In response to this line of authority, Petitioners have cited several aviation decisions, wherein, private causes of action and remedies were created. However, none of these decisions involved wrongful death or personal injury actions, but, on the other hand, dealt with some form of discrimination, oversold flights, or noise, none of which is before this Court. The only other supportive authority cited by Petitioners, which does concern personal injuries, or death, are the dual decisions of one Federal District Judge in *Gabel* v. *Hughes Air Corporation,* 350 F. Supp. 612 (C.D. Cal. 1972); and in re *Paris Air Crash,* 399 F. Supp. 732 (C.D. Cal. 1975). DeKalb County is constrained to point out that not one single Federal Court of Appeals has adopted these decisions, and particularly, the Court of Appeals for the Ninth Circuit (the Circuit Court of Appeals for that region) refused to follow the logic of those cases, opting to follow the case of *McCord* v. *Dixie Aviation Corporation, supra.* See *Sanz* v. *Renton Aviation, Inc.,* 511 F.2d 1027 (9th Cir. 1975). DeKalb County would suggest that additional reasons are available not to apply the approach of Judge Hall. Any suggestion of approval of that approach by this Court would literally open the doors of Federal Court to *all* aviation litigants, be they recipients of personal injury or injuries of a different nature, as well as simple contestants to various contractual, lease, bailment,

security interest, etc., arrangements. This Court should take full cognizance of the burden it imposes upon an already overburdened Federal Court by such a determination. Clearly, this is not the intended result of Congress. See 49 U.S.C.A. § 1506.

The above-noted conclusion is fortified by the 1969 introduction in the United States Senate, by Senator Tydings, of Senate Bill Number 961 (S. 961, 91st Cong., 1st Sess.). That Bill sought to create *exclusive* jurisdiction in Federal Courts for aviation matters, create a Federal cause of action, and create a Federal remedy. The Congressional response to this Bill was that it was never reported out of Committee, after substantial hearings. Cited from 51 N.Y.U. LAW REVIEW, 231 at 238. The *factum* of this Congressional response to Senator Tydings' Bill should be sufficient reply to any of Petitioners' suggestions that this Court imply a cause of action and a remedy from the silent legislation.

Assuming, en arguendo, that this Court does not find the Congressional response to the Tydings' Bill persuasive, then a review must be had as to this Court's rulings in *Cort* v. *Ash,* 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975). Initially, DeKalb County would note that in *Cort* v. *Ash, supra,* in *Securities Investors Protection Corporation* v. *Barbour,* 421 U.S. 412, 95 S. Ct. 1733, 44 L. Ed. 2d 263 (1975), and in *National Railroad Passenger Corporation* v. *National Association of Railroad Passengers,* 414 U.S. 453, 94 S. Ct. 690, 38 L. Ed. 2d 646 (1974), this Court refused to imply or create private causes of action or remedies from silent Federal legislation. The trend created by these decisions is sufficient, in and of itself, to deny such an im-

plication, to the Petitioners herein. But a more specific response is available when viewed in light of this Court's four (4) step test enunciated in *Cort* v. *Ash,* 422 U.S. at 78, 45 L. Ed. 2d, at 36:

> "First, is the Plaintiff one of the class for whose especial benefit the Statute was enacted, (citations omitted)—that is, does the Statute create a Federal right in favor of the Plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? (citation omitted.) Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the Plaintiff? (citations omitted); and finally, is the cause of action one traditionally relegated the State Law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on Federal law? (citations omitted.)"

The Petitioners' efforts to bring themselves within the parameters of these tests have simply failed, particularly Petitioner Fields who was allegedly on the ground at the time of this occurrence. Clearly, none of the Federal legislation or regulations "create a *Federal right* in favor" of the Petitioners, and the first test is thus failed. As for the second test, the Congressional response to the Tydings' Bill evidences an interest to deny a Federal right. The third test has been answered by the numerous Federal Court opinions cited above, while the fourth test is met with the simple fact that the present diversity Petitioners did, in fact, assert their respective claims under State law theories of negligence, nuisance and breach of contract, with State law remedies for punitive damages, wrongful death, personal injury, and property damage being

sought. Moreover, the involvement of a sanitary landfill clearly reserves this area of law for local concern.

Thus, even the application of the *Cort* v. *Ash, supra,* test, leaves the Petitioners without a Federal posture.

IV.

UNDER FEDERAL CONTRACT LAW, THE PETITIONERS ARE NOT THIRD PARTY INTENDED BENEFICIARIES OF THE BROAD ASSURANCES CONTAINED IN THE FEDERAL GRANT AGREEMENTS IN ISSUE

DeKalb County would call this Court's attention to the Restatement of Contracts Section 145, which provides, in part:

> "A promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or failing to do so, unless:
>
> (a)
>
> An intention is manifested in the contract, as interpreted in light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences . . . "

The majority of the Fifth Circuit, adopting the opinion of Circuit Judge Dyer, relied upon the following decisions as supportive of the Restatement Rule in Federal Contract Law; *West* v. *Morrison Knudsen Company,* 451 F.2d 493 (9th Cir. 1971); *Hensley* v. *United States,* 279 F. Supp. 542 (D. Mont. 1968); *Brotherton* v. *Merritt-Chapman and Scott Corpora-*

tion, 213 F.2d 477 (2nd Cir. 1954); *Johnson* v. *Redevelopment Agency,* 317 F.2d 872 (9th Cir. 1963); *Mahler* v. *United States,* 306 F.2d 713 (3rd Cir. 1962); *Housing Corporation of America* v. *United States,* 468 F.2d 922 (Court of Claims, 1972); *Sayre* v. *United States,* 282 F. Supp. 175 (N.D. Ohio 1967). DeKalb County would call this Court's attention to a multitude of similar holdings, including one from this Court, and several of which are recent determinations, as follows: *German Alliance Insurance Company* v. *Home Water Supply Company,* 226 U.S. 220, 33 S. Ct. 32, 57 L. Ed. 195 (1912); *Harlib* v. *Lynn,* 511 F.2d 51 (7th Cir. 1975); *Bogart* v. *United States,* 531 F.2d 988 (Ct. Cl. 1976); *Commonwealth of Pennsylvania* v. *National Association of Flood Insurers,* 378 F. Supp. 1339 (M.D. Pa. 1974), *affirmed* 520 F.2d 11 (3rd Cir. 1975); *McCullough* v. *Redevelopment Authority of Wilkes-Barre,* 522 F.2d 858, 867-868 (3rd Cir. 1975); *King* v. *National Industries, Inc.,* 512 F.2d 29 (6th Cir. 1975); *Goodwin* v. *United States,* 517 F.2d 481 (9th Cir. 1975); *Stanturf* v. *Sipes,* 224 F. Supp. 883 (W.D. Mo. 1963), *affirmed* 335 F.2d 224 (8th Cir. 1964); *Lobianco* v. *Valley Forge Military Academy,* 224 F. Supp. 395 (E.D. Pa. 1963), *affirmed* 331 F.2d 851 (3rd Cir. 1964); *Roberson* v. *United States,* 382 F.2d 714 (9th Cir. 1962); *Hodge* v. *United States,* 310 F. Supp. 1090, 1102 (M.D. Ga. 1969), *affirmed* 424 F.2d 545 (5th Cir. 1970); *United Publishing & Printing Corporation* v. *Horan,* 268 F. Supp. 948 (D. Conn. 1967).

Without burdening this Court with an in depth discussion of each of the above-noted decisions, DeKalb County would particularly cite the decision of *German Alliance Insurance Company* v. *Home Water Supply Company, supra,* wherein this Court had before it a

party who had contracted with a government agency, and this Court held:

> "But even where the right is most liberally granted, it is recognized as an exception to the general principle, which proceeds on the legal and natural presumption, that a contract is only intended for the benefit of those who made it. Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least, show that it was intended for his *direct* benefit." (Emphasis added.)

Clearly, the Restatement Rule was fashioned upon decisions such as this Court's decision in *German Alliance Insurance Company* v. *Home Water Supply Company, supra.* The reason and basis for the Restatement Rule has not changed, nor has or should the rule be changed. Certainly, the concept behind the rule has present vitality as evidenced by the above-noted cases. This approach is very consistent with this Court's recent decision in *United States* v. *Orleans,* — U.S. —, 96 S. Ct. 1971, 48 L. Ed. 2d 390 (1976), wherein this Court unanimously held that the grantor of Federal funds did not subject itself to "countless unidentifiable classes of beneficiaries" *id,* 48 L. Ed. 2d, at 399. Obviously, if the grantor is not liable to "countless unidentifiable classes of beneficiaries" the grantee of said funds, who itself is cloaked with unwaived governmental immunity, equally is not liable.

With the Restatement Rule clearly in focus and its application herein obvious, the next issue requiring resolution is the status, not standing, of the Petitioners under said Rule. A close review of the Rule demonstrates that, as under Georgia Law, third parties, as members of the public, must demonstrate that both

contracting parties clearly manifested an intention to compensate members of the public for breaches of public contracts. DeKalb County asserts that the Petitioners are both *incidental* to the contract *formation* and *incidental* to the contract *execution*. It is truly difficult to comprehend how members of the public could be otherwise. See *United States* v. *Orleans, supra*. Even the suggestion that the class is narrowed to "aeronautical users" changes nothing from the mind-boggling aspects of members of the public being third-party intended beneficiaries of broad assurances in government contracts. (Petitioner Fields is not an "aeronautical user"). As an example, could a "highway user" be a third party intended beneficiary of an interstate highway construction contract between the United States and the State of Georgia or a political subdivision thereof? No, see *Daye* v. *Pennsylvania*, 483 F.2d 294 (3rd Cir. 1973). Clearly, the mountain of authority cited above denies the Petitioners herein the status, not standing, of asserting that they are intended to be compensated by the grant agreements. The incidental recipient status of the Petitioners is simply insufficient to support the present actions, and they were properly dismissed by the lower courts.

The fact that these appeals allegedly concern aviation and aeronautical users does not change the incidental and unintended status of these third persons. Similar grant agreements were before the Courts in *Eastern Airlines* v. *Town of Islip*, 229 N.Y.S. 2d 117 (1962); *Port of New York Authority* v. *Eastern Airlines, Inc.*, 259 F. Supp. 745 (ED. N.Y. 1966), and *City and County of San Francisco* v *Western Airlines, Inc.*, 204 Cal. App. 2d 105, 22 Cal. Rptr. 216 (1962), and those Courts found those aeronautical users were not accorded the status of third party intended beneficiaries under similar grant agreements. The Petitioners' reliance upon *City of Inglewood* v. *City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972), and its progeny, is clearly misplaced.

In that decision, the Plaintiff sought injunctive and declaratory relief based upon an allegedly *continuing breach of an existing grant agreement*. Thus, the issue of *standing* was of paramount interest to that Court, while third-party beneficiaries status was a side-light. Moreover, and of equal importance, that Court cited and distinguished the case of *Port of New York Authority* v. *Eastern Airlines, Inc., supra*, and *City and County of San Francisco* v. *Western Airlines, supra*, finding these cases to involve such aeronautical users as the airlines. While Petitioners righteously contend that they are "aeronautical users" and are thus intended beneficiaries of the grant agreements, they nevertheless cite as supportive authority, a decision which concerns *non-aeronautical users*, and which distinguishes decisions involving aeronautical users. The only other decision cited by the Petitioners suggestively applicable to this area of aeronautical users is *Rapp* v. *Eastern Airlines, Inc.*, 264 F. Supp. 673 (E.D. Pa. 1967). Again, reliance on that case for the matters presently under consideration is misplaced That decision was without contractual issues and the Port Authority, which may or may not have been immune from suit, was not involved therein. Thus, two of the basic issues before this Court, the immunity of DeKalb County, and contractual issues of third-party intended beneficiary status under the Grant Agreements, were not before that Court. Moreover, whatever other application the *Rapp* decision would have had to the facts at bar, was lost when that decision was vacated on April 1, 1970, by

the United States Court of Appeals for the Third Circuit, by and through Chief Judge Hastie and Circuit Judges Maris and Adams. No doubt other suits arising out of the same occurrence were brought before the Third Circuit, but the issues in those suits were inapplicable to the facts herein.

Outside of the aviation field, the Petitioners rely upon language contained within prior opinions of the Fifth Circuit in *Bossier Parish School Board* v. *Lemon,* 370 F.2d 847 (5th Cir. 1967) and *Seaboard Airline Railroad* v. *County of Crisp of the State of Georgia,* 280 F.2d 873 (5th Cir. 1960), dealing with school desegregation and Federal Power Regulation, respectively. Generally speaking, citation of those decisions has been limited to their respective areas of involvement, i.e., school desegregation and Federal Power Regulation, and there is no reason to suggest that either of those issues are presently before this Court. Morover, the Fifth Circuit, by not reciting those cases, as authority herein, has obviously drawn a serious shadow over the present validity of those cases, or at least, found their application to be outside the respective areas of interest in these cases.

Therefore, DeKalb County asserts that under Federal Law, the Restatement of Contracts rule obtains, and the Petitioners have failed to demonstrate that the Grant Agreements in issue intended to benefit and compensate them.

Lastly, it must be reiterated that the only rights accorded the contracting parties by the Grant Agreements in issue were the termination of funds flowing under the Agreement and possible enforcement of performance obligations imposed by the Agreements. See paragraph 2(a), 8(g) of Part I-Offer; paragraph

14 of Part III-Sponsors Assurances. Federal Courts have previously recognized that a third-party beneficiary's right of action on a promise cannot rise higher than the rights of a contracting party, *Seward* v. *South Florida Securities,* 96 F.2d 964 (5th Cir. 1938); and that a third-party beneficiary can acquire no better right to enforce the contract than that held by the contracting parties themselves. *Simmons* v. *Western Assurance Company,* 205 F.2d 815 (5th Cir. 1953). The rights accorded the contracting parties herein, are simply not sufficient to maintain the present actions. As such, the creation of causes of action for wrongful death, personal injury and property damage, with unspecific remedies, all out of silent Grant Agreements, would be without basis in law.

SUMMARY OF RELEVANT FEDERAL AUTHORITY

A review of relevant Federal authority demonstrates that the immunity of the County reigns evident in the Federal area. Even if the immunity of the County were drawn into question, there is no private cause of action or remedy available to the Petitioners herein nor do the Grant Agreements in issue provide any relief to the Petitioners.

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FILED IN CLERK'S OFFICE

OCT 12 1976

BEN H. CARTER, CLERK
BY: _____ DEPUTY CLERK

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGE BENSON MIREE, et al. vs. UNITED STATES OF AMERICA, et al.	:	CIVIL NO. 19293
JUDITH ANITA PHILLIPS vs. UNITED STATES OF AMERICA, et al.	:	CIVIL NO. 19412
FIREMAN'S FUND INSURANCE COMPANY vs. UNITED STATES OF AMERICA, et al.	:	CIVIL NO. C74-24A
WILLIAM MICHAEL FIELDS vs. UNITED STATES OF AMERICA	:	CIVIL NO. C74-291A
MRS. PEARLIE CHAISSON vs. SOUTHEAST MACHINERY, INC.	:	CIVIL NO. C74-915A
MARILYN JOYCE SELLFORS vs. UNITED STATES OF AMERICA	:	CIVIL NO. C74-1069A

ATTEST: A TRUE COPY
CERTIFIED THIS
March 8, 1977
Ben H. Carter, Clerk
By: F. Louis Graham
Deputy Clerk

MARY J. HOWARD, et al. vs. UNITED STATES OF AMERICA	:	CIVIL NO. C74-1074A
LOCAL PROPERTIES, INC., et al. vs. UNITED STATES OF AMERICA, et al.	:	CIVIL NO. C74-1272A
WILLIAM MICHAEL FIELDS vs. SEMAC INDUSTRIES, INC.	:	CIVIL NO. C75-218A
MARY J. HOWARD, et al. vs. UNITED STATES OF AMERICA	:	CIVIL NO. C75-320A

ORDER

These actions, companion cases arising from the crash of an airplane at the DeKalb-Peachtree Airport, are presently before the court on DeKalb County's motions for protective orders relieving it of the duty to answer, admit, or otherwise respond to the first and second requests for admissions filed on behalf of Machinery Buyers Corporation, Southeast Machinery, Inc., Semac Industries, Inc., and Fireman's Fund Insurance Company. In support of its motions, DeKalb County contends that under Fed. R. Civ. P. 36, requests for admissions may only be directed to a "party" and that it is no longer a party to any of these lawsuits. The court

agrees. In the only cases in which DeKalb County was originally a party, Miree v. United States, Civil No. 19293; Phillips v. United States, Civil No. 19412; Fields v. United States, Civil No. C74-291A; Fireman's Fund Insurance Co. v. United States, Civil No. C74-24A; Chaisson v. Southeast Machinery, Inc., Civil No. C74-915A, the court, on September 25, 1974, entered final judgment pursuant to Fed. R. Civ. P. 54(b) dismissing the cases as to DeKalb County. That judgment has now been affirmed by the Fifth Circuit en banc. Miree v. United States, 538 F.2d 643 (5th Cir. 1976). Since DeKalb County is no longer a "party" to any of these lawsuits, requests for admissions may not properly be addressed to it.

Accordingly, DeKalb County's motions for protective orders are hereby granted.

IT IS SO ORDERED this 8th day of October, 1976.

WILLIAM C. O'KELLEY
United States District Judge

FOR ARGUMENT

Supreme Court, U. S.
FILED
APR 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-607

GEORGE HENSON MIREE, CLAUDE ESTES MIREE and DOROTHY ESTES MIRE, Minors, by and Through AUBREY S. MIREE, JR., and CLAUDE H. ESTES, JR., Co-Guardians of Said Minors,
Petitioners,

versus

DEKALB COUNTY, GEORGIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

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IV. Respondent's argument that the central issue in this case is not aviation but "operation of a sanitary landfill," a purely "local governmental function," is wholly at odds with reality 4

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United States v. Texas, 143 U.S. 621 (1892) 2

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DEKALB COUNTY, GEORGIA,
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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

I

DeKalb County's brief suggests at pages 30 and 31, and elsewhere, that we filed this action purely as a diversity case, seeking only state law remedies. We disagree. Our complaint at ¶28 (A. 21), as pointed out in our brief at page 7, charged that maintenance of the garbage dump at the County's airport constituted an airport hazard as defined in the Federal Aviation

Acts. Moreover, an amendment to our complaint further charged at ¶56 (A. 67, 68) that under the Federal Aviation Acts DeKalb County had, by virtue of its operation of the airport, expressly or impliedly waived its immunity. We thus promptly and properly pleaded violations of federal statutes and pleaded waiver of immunity as a matter of federal law.

II

Page four of the Brief of Respondent DeKalb County states that our brief at page forty-two "misleads this Court into believing that DeKalb County is still a party to the present actions in the Lower Court pursuant to cross-claims initiated by the United States."

It is our position that the cross-claims of the United States are still pending and that the statement on page forty-two of our brief, that the cross-claims have not been dismissed, is correct. We rely upon the record, as summarized by the docket entries (Joint Appendix pp. 1-8). An entry (A. 4) of February 15, 1974 shows the cross-claim of the United States filed. An entry of February 27, 1974 (A. 5) shows the answer of DeKalb County to the cross-claim of the United States filed. The United States also filed a memorandum of law (which does not appear in the docket entries), dated February 21, 1974, citing clear authority for the inapplicability of any state law immunity doctrine vis a vis claims of the United States: *United States v. Texas*, 339 U.S. 707 (1950); *United States v. California*, 332 U.S. 19 (1947); *United States v. Texas*, 143 U.S. 621 (1892); *United States v. California*, 328 F.2d 729 (9th Cir. 1964), *cert. den.* 379 U.S. 817 (1964); *United States v. State of Illinois*, 454 F.2d 297 (7th Cir. 1971). Docket entries (A. 6) of June 27, 1974 show orders of the District Court granting DeKalb County's motion to dismiss plaintiffs' complaint and include a notation as follows: "U S's cross-claims against DeKalb County

still pending." Then by order dated September 25, 1974 (App. to our Cert. Petit., A-32) the District Court reconsidered its June 27, 1974 order, which had dismissed plaintiffs' claims against the County, and denied the motions to set aside that June 27, 1974 order. It is from this September 25, 1974 order that appeal was taken, and it is the opinion of the Court of Appeals with respect thereto which resulted in our seeking certiorari. The issue of the United States' cross-claim against DeKalb County has *not* been considered by the courts below and there is no order dismissing that cross-claim. Moreover, the cross-claim cannot be deemed to have been extinguished merely because of the District Court's order (which in any event is still the subject of the instant appeal) dismissing the plaintiffs' claims against the County.[1]

If our analysis of the record is incorrect, and the District Court *has* actually purported to determine that the County is immune from suit on contract by the United States itself, with which it contracted pursuant to statute, then we respectfully suggest that the error of the District Court is even greater than we have heretofore contended.

III

Since our brief was submitted, this Court issued its opinion in *Jones v. The Rath Packing Company*, No. 75-1053, on March 29, 1977. The Court there held:

> Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. Const., Art. VI. The

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[1] Wright & Miller, "Federal Practice and Procedure," v. 6, §1431 at p. 163: "However, the subsequent dismissal of the original claim itself, or the dismissal of that claim against the coparty, does not require that a previously interposed cross-claim also should be dismissed."

> criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is 'to determine whether under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'

The dissent from that opinion by Justices Stewart and Rehnquist pointed out that regulation of flour is a field which the states have traditionally occupied, and that the Court should thus be hesitant in finding federal preemption. Those concerns are inapplicable in our case, where state law, as construed and applied by the District Court, clearly stands as an obstacle to the accomplishment and execution of the federal purposes of safety and uniformity of result in civil aviation. These are important federal interests in a field which federal law has clearly preempted, and which has never been a traditional concern of the states.

IV

We stated in our principal brief that as this litigation has progressed we have increasingly become persuaded of the necessity for federal law to govern the rights and remedies of parties killed or injured by reason of a serious breach of safety provisions in a federal contract for operation of an airport in commerce. We urged that federal common law should apply and that federal common law should both (a) recognize the rights of the dead and injured as third-party beneficiaries of that contract, and (b) implement federal policies of uniformity and high safety standards by refusing to enforce a local law rule of immunity.

We offer the County's brief to this Court as additional argument for the need of federal law to enforce safety by applying proper federal common law rules to govern this case. The County, which owned and operated this airport in commerce, and which accepted federal money to develop it and run it, and which contracted with the FAA to maintain it safely for the use and benefit of the public and the aeronautical users, and which bought an airport liability insurance policy containing a clause to the effect that immunity would not be asserted (A. 53-54 and A. 74), now tells the Court at page 6 of its brief that "clearly, the central issue in this case is the operation of a *sanitary landfill* [emphasis in original], which is obviously a local governmental function, lacking in any federal consequence . . . ." And at the same page the County's brief contends that its "shield of immunity" is not "tarnished" (page 6, respondent's brief). We submit that the County's metaphor is as medieval as its doctrine—a doctrine that federal law need not and ought not embrace.

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Certificate of Service

I hereby certify that three copies of the foregoing Brief have this date been served by mail upon all parties represented in this proceeding this .... day of April, 1977.

Alan W. Heldman

2025 Season

7th Grade

4th Grade